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Title: Granfinanciera, S.A., et al., Petitioners
v.
Paul C. Nordberg, Creditor Trustee for the Estate of Chase & Sanborn Corporation, etc.

Docketed:
April 18, 1988

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Lawrence,Adam

Counsel for respondent: Tribe,Laurence

Entry	Date	Note	Proceedings and Orders
1	Apr 18 1988	G	Petition for writ of certiorari filed.
2	May 18 1988		Brief of respondent in opposition filed.
3	May 24 1988		DISTRIBUTED. June 9, 1988
4	May 26 1988	X	Reply brief of petitioners Granfinanciera, S.A., et al. filed.
5	Jun 13 1988		Petition GRANTED.
			**********
7	Jun 21 1988		Order extending time to file brief of petitioner on the merits until August 23, 1988.
8	Jun 24 1988		Joint appendix filed.
9	Aug 23 1988		Brief of petitioner Granfinanciera, S.A. filed.
11	Aug 23 1988		Order extending time to file brief of respondent on the merits until November 3, 1988.
12	Sep 13 1988		Record filed.
			Certified copy of original record and proceedings, 2 volumes, received.
13	Oct 24 1988		SET FOR ARGUMENT. Monday, January 9, 1989. (2nd case) (1 hr.)
14	Nov 3 1988		Brief of respondent Paul Nordberg filed.
15	Nov 22 1988		CIRCULATED.
16	Dec 2 1988	X	Reply brief of petitioner Granfinanciera, S.A. filed.
17	Jan 9 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87-1716

Supreme Court, U.S.
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NO.

in the

Supreme Court
of the
United States

OCTOBER TERM 1987

GRANFINANCIERA, S.A., a Colombian corporation, and MEDEX, LTDA., a Latin American corporation,

Petitioners,

vs.

PAUL C. NORDBERG, Creditor Trustee for the Estate of Chase & Sanborn Corporation, f/k/a General Coffee Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

Chase & Sanborn filed a Chapter 11 petition in bankruptcy. Trustee Nordberg sued petitioners to recover allegedly fraudulent cash transfers made to petitioners by the debtor before bankruptcy. The relief sought by the trustee, and awarded by the court, was a judgment for the amount of the transfers. Petitioners requested but were denied a trial by jury.

The questions presented are:

1. Did petitioners have a Seventh Amendment right to a jury trial of the fraudulent transfer action where the only relief the trustee requested was money damages?

2. Could Congress' designation of the trustee's fraudulent transfer action as a bankruptcy "core" proceeding, under 28 U.S.C. §157(b)(2) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, abrogate petitioners' Seventh Amendment right to a jury trial of that otherwise traditionally legal cause of action?

> [Although not directly raised below or directly addressed by the lower court, and not a basis for grant of certiorari, petitioners reserve the right to argue the purely legal issue set forth in Question 3, if certiorari is granted.]

3. Does the repeal of 28 U.S.C. §1480, and the enactment of 28 U.S.C. §1411, by the Bankruptcy Amendments and Federal Judgeship Act of 1984, providing for jury trials in certain bankruptcy matters, and the abrogation of Bankruptcy Rules 9015 and 9027(i), providing jury trial procedures, abrogate the petitioners' Seventh Amendment right to a jury trial?

RULE 28.1 LIST

Petitioner Granfinanciera was nationalized by the Government of the Republic of Colombia on January 10, 1986. Over half of the stock of Granfinanciera is owned by Banco de la Republica. Subsidiaries of Granfinanciera are Abonos Colombianos, Distribuidora Farmaceutica Alox Colombiana S.A., La Industria Harinera S.A., Palmas Oleaginosas Bucarelia S.A., Palmeras de la Costa S.A., Promociones Industriales S.A., and Tecimpre S.A. Granfinanciera has no affiliates.

Petitioner Medex has no parents, subsidiaries, or affiliates.

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NO.

in the Supreme Court of the United States

OCTOBER TERM 1987

GRANFINANCIERA, S.A., a Colombian corporation, and MEDEX, LTDA., a Latin American corporation,

Petitioners,

vs.

PAUL C. NORDBERG, Creditor Trustee for the Estate of Chase & Sanborn Corporation, f/k/a General Coffee Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, Granfinanciera, S.A., and Medex, Ltda., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-styled proceeding on January 19, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, reported at 835 F.2d 1341, is reprinted in the Appendix at App. 1.

The opinion of the United States District Court for the Southern District of Florida has not been reported. It is reprinted in the Appendix at App. 18.

The opinion of the Bankruptcy Court for the Southern District of Florida has not been reported. It is reprinted in the Appendix at App. 24. The judgment entered thereon is reprinted in the Appendix at App. 31.

The oral order of the Bankruptcy Court judge, denying the petitioners' demand for jury trial, has not been reported. The pages of the trial transcript of February 20, 1986, on which it appears, are reprinted in the Appendix at App. 33.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. §§157, 1334 and 1409, the respondent brought suit in the United States District Court for the Southern District of Florida. Pursuant to a previous standing order of reference in all *Chase & Sanborn* matters, the trustee's suit was referred to the Bankruptcy Court where, after non-jury trial, money judgments were entered in the trustee's favor against the petitioners (App. 31).

The United States District Court, sitting in an appellate capacity under 28 U.S.C. §158(a), affirmed the judgment of the Bankruptcy Court (App. 18). The United States Court of Appeals for the Eleventh Circuit, reviewing the District Court's decision pursuant to 28 U.S.C. §§158(d) and 1291, affirmed on January 19, 1988 (App. 1). No rehearing was sought.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Seventh Amendment, United States Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .

28 U.S.C. §157 (App. 42).

28 U.S.C. §1411 (App. 45).

28 U.S.C. §1480 (App. 45).

11 U.S.C. §548(a) (App. 45).

11 U.S.C. §550(a) (App. 47).

STATEMENT OF THE CASE

Petitioners Granfinanciera and Medex are foreign banking corporations. Respondent Nordberg is the trustee in bankruptcy for Chase & Sanborn Corporation, the corporate successor to General Coffee Corporation.

On May 19, 1983, Chase & Sanborn filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the bankruptcy court for the Southern District of Florida. The trustee filed his complaint against petitioners on May 17, 1985.

The trustee's complaint (App. 36), alleged the prerequisites for causes of action under 11 U.S.C. §548(a)(1) and (2), including the fact that General Coffee Corporation,

referred to in the complaint as "C & S", was insolvent on the dates of the transfers to petitioners, received less than a reasonably equivalent value in exchange for the transfers, and that the transfers occurred within one year preceding the filing of the bankruptcy petition.

The Complaint described the fraudulent transfers as follows:

Date	Amount	Method of Payment
10/20/82	$1,500,000	Transfer from C & S account at Banque Worms, New York City, New York
12/15/82	$ 100,000	Cashier's check drawn on C & S account with Royal Trust Bank, Miami, Florida
12/16/82	$ 100,000	Cashier's check drawn on C & S account with Royal Trust Bank, Miami, Florida

Each count of the two-count complaint concluded with the assertion that the "transfers are fraudulent conveyances which may be avoided pursuant to 11 U.S.C. §548(a) . . ., and which may be recovered from the Defendants for the benefit of the estate of C & S pursuant to 11 U.S.C. §550(a)."

The trustee's complaint demanded judgment against the petitioners, jointly and severally, as follows:

> (i) As to Count I, avoiding the payments to the Defendants as fraudulent transfers pursuant to 11 U.S.C. §548(a)(2), and awarding damages to the estate of C & S in an amount of not less than $1,700,000 pursuant to 11 U.S.C. §550(a);

> (ii) As to Count II, avoiding the payments to the Defendants as fraudulent transfers pursuant to 11 U.S.C. §548(a)(1), and awarding damages to the estate of C & S in an amount not less than $1,700,000 pursuant to 11 U.S.C. §550(a);
>
> (iii) Awarding the estate of C & S the costs and expenses of this action; and
>
> (iv) Granting the estate of C & S such other and further relief as is just and proper, such as interest from the date of each transfer complained of herein.

The petitioners answered each paragraph of the complaint with a denial or an assertion of absence of knowledge. They also pleaded a variety of affirmative defenses, including the fact that they "acted as a mere conduit for the transfer of funds by General Coffee Corp. to other entities, and as such . . . never received any benefit from this transaction and [were] therefore not liable under Section 548 of the Bankruptcy Code", and that they came within the exception to liability contained in 11 U.S.C. §548(c) for transfers in good faith and for value. The petitioners concluded their answer with: "Defendants demand trial by jury on all issues so triable". The trial judge overruled the request for jury trial on the grounds that there were no triable issues in the case and that the trustee's action was "a core action that originally, under the English common law . . . was a non-jury issue" (App. 34).

At trial, the petitioners' witnesses denied that the money Granfinanciera and Medex received from General Coffee was a gift, or a transfer without consideration, and sought to prove that the $1.5 million Granfinanciera received from General Coffee Corporation was actually the repayment of a loan Granfinanciera had made to a Colombian exporter which that exporter had repaid through Banque Worms. Granfinanciera,

however, was unable to show any relationship between the exporter and General Coffee, or explain to the bankruptcy judge's satisfaction why General Coffee would have undertaken to repay the exporter's debt to Granfinanciera.

The bankruptcy judge found that the petitioners had not acted as a mere conduit of funds, but had been materially benefitted by the transfers, that no consideration flowed from the petitioners to General Coffee, and that General Coffee was never indebted to either defendant (App. 24). Satisfied that the elements of a fraudulent transfer had been established, and that petitioners had not proved their defenses, the judge awarded the trustee $1.5 million against Granfinanciera, and $180,000 against Medex. The judgment did not give the trustee the full monetary relief he sought since the December 16th transfer was shown to be $80,000, not $100,000 as alleged in the complaint; and rather than a $1.7 million judgment against Medex and Granfinanciera, jointly and severally, the trustee only obtained separate judgments against each petitioner for lesser amounts.

On petitioners' appeal to the district court the parties briefed the jury trial issue. The district court, however, chose not to address the jury trial issue in affirming the judgment of the bankruptcy court (App. 18).

Petitioners appealed to the Eleventh Circuit which acknowledged the issue was "thorny" but concluded that the petitioners had no right to a jury trial (App. 1). The circuit court began its analysis by stating that the right to jury trial must arise either from the Seventh Amendment "or from the statute which authorized the trustee's suit". The court found no jury trial provisions in 11 U.S.C. §548, the fraudulent transfer section of the Bankruptcy Code. The court further concluded that because the underlying bankruptcy action, on which the trustee's suit was based, was filed before July 10, 1984, the jury trial provisions of the Bankruptcy Code

were inapplicable. This was so, the court reasoned, because 28 U.S.C. §1480 of the 1978 Bankruptcy Reform Act, which did preserve the right to jury trial, and which was to become effective on June 28, 1984, was repealed and replaced, effective July 10, 1984, by 28 U.S.C. §1411, of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"); and §1411, the court believed, only allowed jury trials for personal injury and wrongful death suits. This left the Seventh Amendment as the only possible source of the petitioners' right to a jury trial.

The circuit court recognized that the Seventh Amendment preserves the right of jury trial for common law causes of action that existed at the time the amendment was adopted, as well as for all legal causes of action. The court, however, without an explicit historical or equitable/legal analysis, simply concluded that jury trials are not required in actions to recover fraudulent transfers because such actions are basically equitable in nature. The mere fact that the bankruptcy court "chose" to grant monetary relief could not, in the circuit court's opinion, change the equitable nature of the cause of action. The court cited *Curtis v. Loether*, 415 U.S. 189 (1974), for the proposition that not every monetary award is "legal" in nature, and that bankruptcy proceedings must be differentiated from "ordinary civil actions".

The circuit court further reasoned that bankruptcy proceedings themselves are inherently equitable, that actions to avoid fraudulent transfers are "core" proceedings and that core proceedings, as statutory creations of BAFJA, must also be "inherently equitable in nature".[1] The court cited *Katchen*

[1]The division of bankruptcy proceedings into "core proceedings" and proceedings "otherwise related to a case under title 11", 28 U.S.C. §157 of BAFJA, was Congress' response to this Court's opinion in *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), holding that the Bankruptcy Act of 1978 had improperly delegated Article III judicial powers to non-Article III bankruptcy judges. In core proceedings

v. Landy, 382 U.S. 323 (1966), for the principle that Congress, by defining an action to avoid a fraudulent transfer as a core proceeding, had converted the trustee's fraudulent transfer claims against the petitioners into equitable causes of action.

Lastly, again citing *Curtis v. Loether*, the circuit court opined that jury trials would "dismember" Congress' statutory scheme, reflected in the Bankruptcy Code, for the prompt and expeditious settlement of debtors' estates. Concluding that petitioners had no statutory or constitutional right to a jury trial, the court affirmed the judgment of the district court (App. 1).

REASONS FOR GRANTING THE WRIT

I.

THE CIRCUIT COURT'S SEVENTH AMENDMENT ANALYSIS MISAPPLIES AND SUBSTANTIALLY CONFLICTS WITH THE DECISIONS OF THIS COURT.

This Court has consistently held that the Seventh Amendment preserves the right to jury trial in historically legal causes of action, in suits analogous to traditional suits at common law, and in all suits, both statutory and non-statutory, in which legal rights and issues are to be

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(Footnote 1 continued)

the final judgment may be entered by a bankruptcy court judge. In related proceedings, unless the parties consent to complete bankruptcy court jurisdiction, a district judge enters the final judgment. 28 U.S.C. §157(c). Actions to recover fraudulent transfers, and preferences, are defined as core proceedings under BAFJA. 28 U.S.C. §157(b)(2)(F) and (H).

determined.[2] *Tull v. United States*, 107 S.Ct. 1831, 1835 (1987); *Pernell v. Southall Realty*, 416 U.S. 363, 375-376 (1974); *Ross v. Bernhard*, 396 U.S. 531, 534 (1970); *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935). The proper Seventh Amendment analysis for determining whether a statutory cause of action falls into one of the three foregoing categories, or is equitable in nature, is set forth in *Tull v. United States*, 107 S.Ct. at 1835:

> To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. [Citations omitted]. Second, we examine the remedy sought and determine whether it is legal or equitable in nature. [Citations omitted].

The opinion of the Eleventh Circuit below is conspicuously devoid of the required historical analysis. The circuit court's primary authority for its unexamined conclusion that "[j]ury trials are not required in actions to recover fraudulent conveyances" (App. 14), is its own decision in *Pettigrew v. Graham (In re Graham)*, 747 F.2d 1983 (11th Cir. 1984). *Pettigrew v. Graham*, however, specifically recognized that historically, at common law, "the law courts tried those [fraudulent transfer actions] in which the creditor sought legal remedies", and that "an action by a creditor or

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[2]The legal claims and issues tried in this case included the amount of each fraudulent transfer, whether the debtor had received consideration for each transfer, whether Medex and Granfinanciera had received a legal benefit from the transfers, and whether Medex and Granfinanciera were jointly liable for the full $1.68 million in combined transfers or only for their own respective transfers.

trustee-in-bankruptcy seeking money damages is an action at law". *Id.* at 1387. The circuit court, for reasons it did not express, failed to apply in this case the historical analysis of the fraudulent transfer cause of action it had developed in *Pettigrew v. Graham*.

The question of whether the historical antecedents to the fraudulent transfer cause of action were legal or equitable, was no longer open to serious dispute after this Court's opinion in *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94 (1932), which extensively analyzed English and early American law of fraudulent and preferential transfer and determined, of the cause of action for preferential transfer, that, "[i]n England, long prior to the enactment of our first Judiciary Act, common-law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts".[3]

The second inquiry required by the test in *Tull v. United States*—whether the remedy sought is legal or equitable in nature—was either misapplied or simply ignored by the circuit court. The court felt that it could not distinguish a demand for money damages from a demand for the return of the fraudulently transferred money itself, or property fraudulently transferred from the value of the property (App. 15). But these are precisely the distinctions between money damages and equitable remedies that must be drawn under *Tull v. United States* to properly resolve the Seventh Amendment question.

[3]Although there are certain substantive distinctions between preferential transfers to creditors under 11 U.S.C. §547, and fraudulent transfers to creditors or others under 11 US.C. §548 and related sections, the similarities between the two causes of action are sufficient to have led most courts to consider the causes of action together for Seventh Amendment analysis purposes, in cases where only money damages are sought.

This Court has consistently accorded significant weight, in a Seventh Amendment analysis, to the fact that the relief sought is purely monetary. *Ross v. Bernhard*, 396 U.S. at 543 ("In the instant case we have no doubt that the corporation's claim is, at least in part, a legal one. The relief sought is money damages"); *Pernell v. Southall Realty*, 416 U.S. at 371 ("This Court has long assumed that actions to recover land, like actions for damages to a person or property, are actions at law triable to a jury"); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 476 (1962) ("Petitioner's contention . . . is that insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal. We agree with that contention"); *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891) ("[W]here an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law"). The circuit court did not discuss these cases but cited instead to *Curtis v. Loether*, and various lower court cases, for the principle that the legal damages sought and awarded in this case were merely incidental to the trustee's primary equitable claim for an avoidance of the transfers to petitioners.

By engaging in this analysis, the circuit court, contrary to the decisions of this Court, allowed the presence in the complaint of a claim for equitable relief—assuming that 'avoidance' is an equitable remedy at all—to control the petitioners' right to jury trial. It is, of course, self-evident that the trustee's demand for damages cannot be characterized as secondary or incidental to his demand for avoidance of the fraudulent transfers. Avoidance standing alone was obviously not what the trustee desired, or needed, and he did not complain when, in the final judgment, money damages, and not the metaphysical and singularly unenriching "remedy" of avoidance, was awarded. Assuming, however, that the mere request for avoidance converted the demand for money damages into an incidental remedy, this Court has held that the presence of equitable claims and issues does not deprive

a litigant of its right to trial by jury of the legal claims and issues. Seventh Amendment rights to jury trial on legal issues "cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought". *Curtis v. Loether*, 415 U.S. at 197, n.11; *Dairy Queen, Inc. v. Wood*, 369 U.S. at 470, 473; *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-511 (1959). Nor is the fact that the trustee used the quasi-equitable word 'avoidance' in his otherwise legal cause of action determinative of the petitioners' right to jury trial since "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings". *Dairy Queen, Inc. v. Wood*, 369 U.S. at 477, 478.

The circuit court's Seventh Amendment analysis also conflicts with the decisions of this Court which hold that Seventh Amendment rights are not to be abridged because their exercise could impede the expeditious functioning of the courts. *See e.g., Pernell v. Southall Realty*, 416 U.S. at 385, which "reject[s] the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial". The circuit court, however, believed that jury trials would frustrate the "prompt resolution of all bankruptcy causes of action" and, citing *Curtis v. Loether*, 415 U.S. at 195, would "dismember" the statutory scheme of the Bankruptcy Act (App. 17). The 'dismemberment' discussion in *Curtis v. Loether*, 415 U.S. at 195, however, concerned jury trials for bankruptcy *claims*—matters traditionally resolved summarily without a jury—not independent actions against third party non-claimants like the petitioners herein. Furthermore, this Court has long assumed that jury trials of preferential transfer actions against third party non-claimants are completely consistent with the expeditious administration of the bankruptcy courts. *See Schoenthal v. Irving Trust Co.*, expressly approved in *Katchen v. Landy*, 382 U.S. at 336.

II.

THE CIRCUIT COURT'S SEVENTH AMENDMENT ANALYSIS CONFLICTS WITH NUMEROUS CIRCUIT COURT, DISTRICT COURT AND BANKRUPTCY COURT DECISIONS, HOLDING THAT SUITS BY BANKRUPTCY TRUSTEES FOR MONEY JUDGMENTS IN FRAUDULENT TRANSFER AND PREFERENTIAL TRANSFER ACTIONS ARE ACTIONS AT LAW.

The vast majority of lower courts to consider the issue have concluded that a fraudulent transfer or preference action by a bankruptcy trustee, in which a money judgment alone is sought, is a legal action that must be tried to a jury. The cases so holding have been decided under the Bankruptcy Act of 1898, the Bankruptcy Act of 1978, and BAFJA. *E.g., Schoenthal v. Irving Trust Co.*, 287 U.S. at 95, nn.2-4, collecting numerous cases, *Black v. Boyd*, 248 F.2d 156 (6th Cir. 1957); *Prudential Ins. Co. of America v. Nelson*, 96 F.2d 487 (6th Cir. 1938); *Adams v. Jones*, 11 F.2d 759 (5th Cir. 1926); *First State Bank of Milliken v. Spencer*, 219 F.503 (8th Cir. 1915); *Warmath v. O'Daniel*, 159 F.87 (6th Cir. 1908); *Lewinson v. Hobart Service Trust Co. of Passaic, N.J.*, 49 F.2d 356 (D. N.J. 1931); *Grant v. National Bank of Auburn*, 197 F.581 (N.D. N.Y. 1912); *Edelman v. Michigan Blueberry Growers Ass'n. (In re Silver Mill Frozen Foods)*, 80 B.R. 848 (Bankr. W.D. Mich. 1987); *T.O.S. Industries v. Ross Hill Controls Corp.*, 72 B.R. 749 (S.D. Tex. 1987); *Eisenberg v. Guardian Group, Inc. (In re Adams, Browning & Bates, Ltd.)*, 70 B.R. 490 (Bankr. E.D. N.Y. 1987); *Zimmerman v. Cavanagh (In re Kenval Marketing Corp.)*, 65 B.R. 548 (E.D. Pa. 1986); *Walsh v. Long Beach Honda (In re Gaildeen Industries, Inc.)*, 59 B.R. 402 (N.D. Cal. 1986); *Otte v. Monsanto Co. (In re McCrary's Farm Supply, Inc.)*, 57 B.R. 423 (Bankr. E.D. Ark. 1985); *Boss-Linco Lines, Inc. v. Laidlaw*

Transportation, Ltd. (In re Boss-Linco Lines, Ltd.), 55 B.R. 299 (Bankr. W.D. N.Y. 1985); *Hassett v. Weissman (In re O.P.M. Leasing Services, Inc.)*, 48 B.R. 824 (S.D. N.Y. 1985); *Farmers & Merchants National Bank v. Aylesworth (In re Arnett Oil, Inc.)*, 44 B.R. 603 (N.D. Ind. 1984); *Young v. Peter J. Saker, Inc. (In re Paula Saker & Co., Inc.)*, 37 B.R. 802 (Bankr. S.D. N.Y. 1984); *Beck v. Fairchild Aircraft Corp. (In re Sunair International, Inc.)*, 32 B.R. 142 (Bankr. S.D. Fla. 1983); *Salomon v. Luzar (In re Black & Geddes, Inc.)*, 25 B.R. 278 (Bankr. S.D. N.Y. 1982); *Nickinello v. Roberson (In re Huey)*, 23 B.R. 804 (Bankr. 9th Cir. 1982). *Contra, e.g., Reda, Inc. v. Harris Trust & Savings Bank (In re Reda, Inc.)*, 60 B.R. 178 (Bankr. N.D. Ill. 1986).

III.

THE DECISION OF THE CIRCUIT COURT CONFLICTS WITH DECISIONS OF THIS COURT DEFINING THE ROLE OF THE JURY IN BANKRUPTCY AND OTHER EQUITABLE PROCEEDINGS.

The circuit court concluded that bankruptcy proceedings are inherently equitable, that core proceedings, of which an action to recover a fraudulent transfer is one, are creatures of the Bankruptcy Code, and that core proceedings must thus be equitable. In support of this thesis, the court cited *Katchen v. Landy*, 382 U.S. at 336-337, for the principle that if the bankruptcy laws can convert a creditor's legal claim against a debtor's estate into an equitable claim, the Bankruptcy Code can also convert a fraudulent transfer action into an equitable claim by categorizing it as a core proceeding (App. 16).

The circuit court's reliance on *Katchen v. Landy* represents a distinct misapplication of controlling precedent. A jury trial was denied in *Katchen v. Landy* only because

the defendant had filed a *claim* against the debtor's estate and the trustee asserted the fraudulent preference as a defense and offset against the claim. By filing the claim, the defendant invoked, and submitted itself to, the equitable jurisdiction of the bankruptcy court. If the defendant had not filed a claim, as *Katchen v. Landy* noted, *id.* at 336, citing *Schoenthal v. Irving Trust Co.*, it would have been entitled to a jury trial on the trustee's preference action for damages. *Schoenthal v. Irving Trust Co.*, and *Katchen v. Landy* thus stand squarely for the proposition expressly rejected by the circuit court below—that non-claimant defendants, like the petitioners herein sued by a trustee for damages, have a right to trial by jury in an otherwise equitable bankruptcy proceeding.

The circuit court's decison also conflicts with decisions of this Court which hold that legal issues do not lose their Seventh Amendment identity merely by being presented for determination in an equitable context. As this Court stated in *Ross v. Bernhard*, 396 U.S. at 539, "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action". *See Dairy Queen, Inc. v. Wood*, 369 U.S. at 470, 472-473 and n.8; *Beacon Theatres, Inc. v. Westover*, 359 U.S. at 510-511. This Court has accordingly observed that "legal claims are not magically converted into equitable issues by their presentation to a court of equity". *Ross v. Bernhard*, 396 U.S. at 539. *Schoenthal v. Irving Trust Co.*, 287 U.S. at 94-95, notes that, historically, fraudulent preference actions for money damages were not even litigated in bankruptcy court. Such actions constituted "no part of the proceedings in bankruptcy but concern[ed] controversies arising out of it". Yet, the circuit court, by deciding that Congress' incorporation of a fraudulent transfer action into the core proceeding section of the Bankruptcy Code converted that action, in all cases, into an equitable cause of action, has engaged in precisely

the type of magical conversion analysis that *Ross v. Bernhard* condemns.

IV.

THE DECISION OF THE CIRCUIT COURT THAT AN OTHERWISE LEGAL CAUSE OF ACTION TO RECOVER A FRAUDULENT TRANSFER IS CONVERTED INTO AN EQUITABLE ACTION BY VIRTUE OF BEING LABELED BY CONGRESS A CORE PROCEEDING CONFLICTS WITH NUMEROUS DISTRICT COURT AND BANKRUPTCY COURT DECISIONS.

The circuit court's decision that every fraudulent transfer action is equitable because it is a core proceeding is apparently one of first impression on the circuit level. The identical issue, and closely related issues, however, have been the subject of extensive and conflicting analysis by the lower courts.

The district and bankruptcy courts are sharply divided on the question of whether there is a Seventh Amendment right to a jury trial in any "core" proceeding under BAFJA. The courts are also deeply divided on whether *Katchen v. Landy*, *Schoenthal v. Irving Trust Co.*, and the traditional bankruptcy law distinction between "summary" proceedings which could be heard without a jury, and "plenary" proceedings which could not, have any continuing role to play, after *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, in a Seventh Amendment analysis. Among the cases noting this split of authority and collecting representative cases on each side, are *American Universal Ins. Co. v. Pugh*, 821 F.2d 1352, 1355 (8th Cir. 1987); *Global International Airways Corp. v. Azima (In re Global International Airways Corp.)*, 81 B.R. 541, 543 (W.D. Mo. 1988); and *Eisenberg v. Guardian Group, Inc. (In re Adams, Browning & Bates, Ltd.)*, 70 B.R. at

494-496. The decision of the Eleventh Circuit is squarely in conflict with those cases which properly continue to apply *Schoenthal v. Irving Trust Co.* to "core" proceedings and which allow a jury trial when the trustee is seeking only legal relief. *E.g., Edelman v. Michigan Blueberry Growers Ass'n. (In re Silver Mill Frozen Foods)*, 80 B.R. at 853-854; *T.O.S. Industries v. Ross Hill Controls Corp.*, 72 B.R. at 751; *Zimmerman v. Cavanagh (In re Kenval Marketing Corp.)*, 65 B.R. at 553-554; *Farmers & Merchants National Bank v. Aylesworth (In re Arnett Oil, Inc.)*, 44 B.R. at 604.

V.

THE IMPORTANCE OF A RESOLUTION OF THE SEVENTH AMENDMENT ISSUE IN THIS CASE TO THE PUBLIC GENERALLY AND TO THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM IN PARTICULAR JUSTIFIES THIS COURT'S EXERCISE OF JURISDICTION.

This Court has stated that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care". *Dimick v. Schiedt*, 293 U.S. at 485-486. Under the circuit court's narrow view of the reach of the Seventh Amendment, third parties, like the petitioners herein, who have not invoked or submitted themselves to bankruptcy's equitable jurisdiction will nevertheless find themselves deprived of a jury trial for what historically have been legal causes of action. The potentially vast reach of the circuit court's holding, to any party sued for damages by a trustee in any core proceeding, requires that the circuit court's novel legal reasoning be rigorously scrutinized as *Dimick v. Schiedt* demands.

A decision on the right to jury trial, under the circumstances present here, obviously will have a profound effect on the bankruptcy system. Under the present state of the law, there is widespread conflict and uncertainty over whether and under what circumstances jury trials should be permitted in bankruptcy core proceedings. This Court could resolve that conflict and uncertainty by granting certiorari in this case.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Appendix

In re CHASE & SANBORN CORP.,
f/k/a General Coffee Corp., Debtor.

Paul C. NORDBERG,

Plaintiff-Appellee,

v.

GRANFINANCIERA, S.A., a Colombian corporation,
and Medex, Ltda, a Latin American corporation.

Defendants-Appellants.

No. 86-5738.

United States Court of Appeals,
Eleventh Circuit.

Jan. 19, 1988.

* * *

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

MORGAN, Senior Circuit Judge:

This is an appeal by the Colombian defendants Granfinanciera, S.A. and Medex, Ltda. from an adverse bankruptcy decision by the district court that three money transfers from debtor Chase & Sanborn Corporation, f/k/a General Coffee Corporation ("C & S"), to defendants were fraudulent and, therefore, could be avoided by debtor's creditor/trustee, Paul C. Nordberg. We affirm.

I. FACTS

The money transfers involved in this case consisted of: (1) a $1,500,000 wire transfer on October 21, 1982, from C & S's account in the New York Banque Worms to Granfinanciera's bank account at Banco Real in Miami; (2) a cashier's check for $100,000 dated December 15, 1982, purchased by C & S from Royal Trust Bank in Miami and deposited in Medex's account at Banco Real in Miami; and (3) another cashier's check for $80,000 dated December 16, 1982, purchased by C & S from Royal Trust Bank in Miami and deposited in Medex's account at Banco Real in Miami.

C & S filed a petition for bankruptcy on May 18, 1983. The trustee subsequently sued Granfinanciera and Medex alleging that at the time of the transfers C & S was insolvent[1] and that C & S received no consideration or less than a reasonably equivalent value in exchange for the transfers. Therefore, the trustee alleged, the transfers were fraudulent conveyances which may be avoided pursuant to 11 U.S.C.

[1]11 U.S.C. Sec. 101(31) defines "insolvent" as:

> (A) with reference to an entity other than a partnership, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—
>
> (i) property transferred, concealed, or removed with intent to hinder, delay or defraud such entity's creditors; and
>
> (ii) property that may be exempted from property of the estate under section 522 of this title; . . .

Sec. 548(a)(2)[2] and which may be recovered from Granfinanciera and Medex for the benefit of the estate of C & S pursuant to 11 U.S.C. Sec. 550(a).[3] Both defendants were properly served in Bogota, Colombia on December 26, 1985. On January 10, 1986, the Government of Colombia nationalized Granfinanciera. Granfinanciera and Medex filed motions *inter alia* to dismiss this suit for lack of personal and subject matter jurisdiction. The bankruptcy judge denied the motions and commenced trial on February 20, 1986. Following several interruptions in the trial, the bankruptcy court entered judgment for the trustee against Granfinanciera and Medex. On appeal, the district court affirmed the judgment of the bankruptcy court.

Defendants appeal alleging neither court properly exercised *in personam* jurisdiction over defendants, defendant

[2]Section 548(a)(2) provides in pertinent part:

> The trustee may avoid any transfer of an interest of the debtor in property . . . that was made or incurred or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily . . . (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (B)(i) was insolvent on the date that such transfer was made . . .

[3]Section 550(a) states:

> Except as otherwise provided in this section, to the extent that a transfer is avoided under section . . . 548 . . ., the trustee may recover, for the benefit of the estate, the property transferred, or if the court so orders, the value of such property, from
>
> (1) the initial transferee of such transfer or the entity for whose such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.

Granfinanciera is an instrumentality of the Colombian government and thus is immune from United States jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. Secs. 1602–10 ("FSIA"), and the trustee's equitable cause of action which sought only monetary relief remains a legal proceeding to which the seventh amendment right to trial by jury attaches.

II. DISCUSSION

A. PERSONAL JURISDICTION

Service of process is the physical means by which personal jurisdiction is obtained over a party. Chapter 11 employs Rule 4(a), (b), (d), (e), and (g)-(i) of the Federal Rules of Civil Procedure for service in adversary proceedings.[4] Rule 4(e) pertains to service upon a party not an inhabitant of or found within a state. Granfinanciera and Medex mistakenly rely on the second sentence of Rule 4(e)[5] to assert that the court must use Florida's long-arm statute to obtain personal jurisdiction over them. This premise ignores the first sentence of Rule 4(e) which states that where a federal statute provides for service of process the court should use that statute.[6] Federal Bankruptcy Rule 7004(d) provides for nationwide service of process and thus is the statutory basis for personal jurisdiction in this case, not Florida's long-arm statute. *See Wichita Federal Savings & Loan Ass'n v. Landmark Group*, 657 F.Supp. 1182, 1194 (D.Kan.1987); C. Wright & A. Miller, *Federal Practice and Procedure*, Secs. 1118, 1125 (1987). *Cf. Max Daetwyler Corp. v. Meyer*, 762 F.2d 290, 295 (3d Cir.), *cert. denied*, 474 U.S. 980, 106 S.Ct. 383, 88, L.Ed. 336 (1985) (absent a federal statute authorizing nationwide service of process, federal court must turn to state long-arm statutes); *Colon v. Gulf Trading Co.*, 609 F.Supp. 1469, 1474–75 (D.P.R. 1985) (court must use Puerto Rican long-arm statute because admiralty statutes do not provide for nationwide service of process.)

Exercise of this Congressional grant of authority is not boundless, however. The due process clause of the fifth amendment[7] constrains a federal court's power to acquire personal jurisdiction via nationwide service of process.[8]

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[4]Bankr.Rule 7004, 11 U.S.C.A. (West 1984).

[5]The second sentence of Rule 4(c) reads in pertinent part:

> Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state . . . service may in either case be made under the circumstances and in the manner prescribed in the statute or rule. Fed.R.Civ.P. 4(e), 28 U.S.C.A. (West 1960 & Supp.1986).

[6]*See id.*

[7]The fifth amendment provides that "no person shall be . . . deprived of life, liberty, or property without due process of law."

[8]Federal courts agree that a fifth amendment due process inquiry is necessary where, as in the case at bar, the defendant is an alien, i.e., neither a United States citizen or national. We note, without deciding the issue, that there is a lack of consensus among the courts as to whether a due process analysis is necessary where the defendant is a domestic corporation served via nationwide service of process. Several courts insist upon a full-blown minimum contacts analysis. *See, eg., Wichita Federal Savings & Loan Ass'n*, 657 F.Supp. at 1194–95 (issue of personal jurisdiction requires a fifth amendment due process "minimum contacts" analysis, considering burden of litigation on defendant, defendant's reasonable expectations and foreseeability of litigation in forum state, plaintiff's interest in convenient and effective relief, federal judicial system's interest in efficiently resolving controversies, and forum state's interest in having a court within forum state adjudicate the dispute); *Bamford v. Hobbs*, 569 F.Supp. 160, 166 (S.D.Tex.1983) (listing substantially same factors as *Wichita Federal, supra*).

Pioneer Properties, Inc. v. Martin, 557 F.Supp. 1354, 1358 (D.Kan.1983); *In re Fotochrome, Inc.*, 377 F.Supp. 26, 29 (E.D.N.Y.1974) (construing former bankruptcy statute), *aff'd*, 517 F.2d 512 (2d Cir.1975); *In re Deak*, 63 B.R. 422, 428 (Bankr.S.D.N.Y.1986); *In re A & W Publishers, Inc.*, 39 B.R. 666, 667 (Bankr.S.D.N.Y.1984).

We look to *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and its progeny for guidance in determining whether due process is satisfied here.[9] *See Lapevrouse v. Texaco, Inc.*, 693 F.2d 581, 586 (5th Cir.1982); *Bamford v. Hobbs*, 569 F.Supp. 160, 166 (S.D.Tex.1983). The Court, in *International Shoe*, found that:

(Footnote 8 continued)

Other courts hold that the defendant's mere presence within the United States satisfies whatever due process concerns exist. *See, e.g., Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir.1974) (where defendants reside within United States "minimal contacts" are present); *Clement v. Pehar*, 575 F.Supp. 436, 438–39 (N.D.Ga.1983) (where nationwide service of process is authorized, due process only requires defendant have minimum contacts with United States; defendants were U.S. citizens and properly served within U.S., therefore, district court "may constitutionally exercise jurisdiction over them.")

While still other courts determine that a due process analysis is completely unnecessary where service is nationwide and is properly performed outside the forum district yet within the United States. *See e.g., Pioneer Properties, Inc.*, 557 F.Supp. at 1358 and n. 6 (no fifth amendment limitation on jurisdiction if nationwide service is properly perfected outside forum district but within United States); *In re Prospect Hill Resources, Inc.*, 69 B.R. 79, 79–80 (Bankr.N.D.Ga.1986) (no due process "minimal contacts" requirement necessary to justify exercise of jurisdiction where defendant was Illinois resident, case involved federal question litigation, and Congress provided for nationwide service of process); *In re Whippany Paper Board Co.*, 15 B.R. 312, 315 (Bankr.D.N.J.1981) ("minimum contacts test has no particular relevance" in bankruptcy suit between domestic corporations because federal statute confers jurisdiction and provides for nationwide service).

[9] *International Shoe* and its progeny were decided under fourteenth amendment due process constraints on state courts using state long-arm

> [D]ue process requires . . . that an order to subject a defendant to judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

326 U.S. at 316, 66 S.Ct. at 158 (citing *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940)). Inquiry into a defendant's contacts must not be mechanical. *Id.* 326 U.S. at 319, 66 S.Ct. at 159. Instead, a court must weigh the facts of each case to determine whether the requisite "affiliating circumstances" are present. *Kulko v. California Superior Court*, 436 U.S. 84, 92, 98 S.Ct. 1690, 1697, 56 L.Ed.2d 132 (1978); *Hanson v. Dencla*, 357 U.S. 235, 246, 78 S.Ct. 1228, 1235–36, 2 L.Ed.2d 1283 (1958). In a minimum contacts inquiry where a defendant is an alien, the emphasis is on the fairness and reasonableness of requiring the defendant to appear in the United States. *In re Deak*, 63 B.R. at 430. *See Max Daetwyler Corp.*, 762 F.2d at 294. Factors to be considered include (a) the extent of the defendant's purposeful interjection into the forum state; (b) the burden on the defendant of defending in the forum; (c) the extent of conflict with the sovereignty of defendant's state; (d) the forum state's interest in adjudicating the dispute; (e) the most efficient judicial resolution of the controversy; (f) the importance of the forum to plaintiff's interest in convenient and effective relief; and (g) the existence of an

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(Footnote 9 continued)

statutes to acquire personal jurisdiction over foreign as opposed to alien defendants. The due process concerns of the fifth and fourteenth amendments are not precisely parallel, however. *See Max Daetwyler Corp.*, 762 F.2d at 294 n. 4 ("[I]nterstate federalism concerns which animate fourteenth amendment due process analysis under *International Shoe* and its progeny are diminished in the fifth amendment context.") (citations omitted). *See also* Lilly, *Jurisdiction Over Domestic And Alien Defendants*, 69 Vand.L.Rev. 85 (1983).

alternative forum.[10] *In re Deak*, 63 B.R. at 430, *citing Insurance Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir.1981).

1. Extent of defendant's purposeful interjection into Florida

The debtor, C & S, ordered the transfers out of which this cause of action arose from its Miami office. The transfers, in United States currency, were made from the debtor's New York and Miami bank accounts. Under 11 U.S.C. Sec. 548(a)(2) a fraudulent conveyance is established when a non-creditor of an insolvent debtor receives a transfer without returning value or consideration for the transfer. *See Mayo v. Pioneer Bank and Trust Co.*, 270 F.2d 823, 829 (5th Cir.1959), *cert. denied*, 362 U.S. 962, 80 S.Ct. 878, 4 L.Ed.2d

[10]When determining jurisdiction over an alien defendant, courts disagree whether the defendant's aggregate contacts with the United States or the defendant's contacts with the particular state are to be considered. *Compare Max Daetwyler Corp.*, 762 F.2d at 293–94 (aggregate national contacts may be appropriate), *In re Deak*, 63 B.R. at 430 n. 8 (defendant's national contacts appropriately considered a jurisdictional base where federal statute provides for nationwide service) *with Pioneer Properties, Inc.*, 557 F.Supp. at 1359 (court only considered defendant's contacts with forum state in determining jurisdiction); *In re A & W Publishers, Inc.*, 39 B.R. at 667–68 (court looked to defendant's contacts with forum state to determine jurisdiction).

In the case at bar we need not determine which view is correct. Granfinanciera and Medex conducted numerous international business transactions utilizing their bank accounts in Miami, New York, Chicago, and San Francisco. The action was brought in the United States District Court for the Southern District of Florida. The transfers out of which this action arose were made from debtor's United States bank accounts in New York and Miami in United States currency, to the Miami bank accounts of each defendant. Sufficient contacts exist in this case with the entire United States and with the forum state.

877 (1960);[11] *In re Health Gourmet, Inc.*, 29 B.R. 673, 677 (Bankr.D.Mass.1983). The fraudulent conduct and its injurious effect occurred in Miami.

Moreover, the record supports the finding of the district court that the defendants conducted numerous international business transactions utilizing their bank accounts in Miami, as well as New York, Chicago, and San Francisco.

2. Burden on defendants of defending transfers in Florida

Modern means of communication and transportation have lessened the burden of defending a lawsuit in a distant forum. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292–93, 100 S.Ct. 559, 564, 62 L.Ed.2d 490 (1980); *Hanson*, 357 U.S. at 251, 78 S.Ct. at 1238, *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222–23, 78 S.Ct. 199, 200, 2 L.Ed.2d 223 (1957). There appear to be relatively few impediments to defending this particular lawsuit. Transportation between Bogota and Miami is readily available. *Compare Insurance Co. of North America*, 649 F.2d at 1271 (no direct transportation to or from defendant shipyard to forum). Granfinanciera and Medex are good-sized banking concerns which, presumably, have access to at least telephone lines, if not the more sophisticated electronic telecommunication equipment available today.

3. Extent of conflict with Colombia's sovereignty

The doctrine of comity between sovereign nations dictates that we examine possible conflicts with Colombia's

[11]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

sovereignty. As discussed *infra*, Granfinanciera is presently an instrumentality of the Colombian government. This fact would, in most instances, bear negatively on the reasonableness of personal jurisdiction. *See Insurance Co. of North America*, 649 F.2d at 1272. These transfers occurred and this case was filed, however, before Granfinanciera's nationalization. Thus, as discussed *infra*, any benefits of sovereignty do not attach to this cause of action.

This cause of action arises under United States Bankruptcy laws. Except for the decrees pertaining to Granfinanciera's nationalization, no Colombian law or other interest of that government is involved in the present controversy.

4. *Florida's interest in adjudicating the dispute; the most efficient judicial resolution of the controversy*

The United States Bankruptcy Court for the Southern District of Florida has a substantial interest in adjudicating the legitimacy of the debtor's transfers to Granfinanciera and Medex in order that all facets of the C & S reorganization may be consistently decided and the trustee may recover all assets which belong in the debtor's estate. The debtor is a Florida corporation. It filed for reorganization in the Southern District of Florida. This case is one of more than seventy actions commenced by the debtor's trustee against various entities to recover fraudulent or preferential transfers for the benefit of the C & S estate. Many of these actions, including the instant case, were filed in the Southern District of Florida. Nearly all of the activities involved in this particular case occurred in Florida. Much of the evidence needed exists in Miami, in the debtor's records and the records of the banks in which debtor and defendants had their respective accounts. The federal courts in the Southern District of Florida are familiar with the litigation aspects of the C & S reorganization and so would provide the most efficient

judicial resolution to adversarial proceedings arising out of debtor's pre-bankruptcy transactions.

5. *Convenient and effective relief for C & S; existence of an alternative forum*

This cause of action arose under United States bankruptcy law. Only a United States court would have subject matter jurisdiction. As discussed *supra*, C & S is a Florida corporation and most of the particulars of this case occurred in the Southern District of Florida. Thus, the Southern District of Florida is the most suitable forum. Granfinanciera and Medex are no more inconvenienced by a trip to one state than another. *See Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F.Supp. 659, 663 (D.N.H.1977). *Accord DeJames v. Magnificence Carriers, Inc.*, 491 F.Supp. 1276, 1281 (D.N.J.1980), *aff'd*, 654 F.2d 280 (3d Cir.1981), *cert. denied*, 454 U.S. 1085, 102 S.Ct. 642, 70 L.Ed.2d 620 (1981).

In sum, the statutory and constitutional concerns are satisfied; both the bankruptcy and district court properly exercised *in personam* jurisdiction over Granfinanciera and Medex.

B. FOREIGN SOVEREIGN IMMUNITIES ACT

The United States follows the "restrictive" theory of sovereign immunity. Our courts will only waive jurisdiction if the cause of action arose out of a foreign sovereign's governmental rather than commercial act. *See Verlinden B.V. V. Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). FSIA, which embodies this theory, delineates the circumstances under which an agency or instrumentality of a foreign sovereign may be subject to suit in a court of the United States. Granfinanciera contends that it was nationalized by the Colombian government, is thereby

an instrumentality of that government,[12] and is thus immune from the jurisdiction of the courts of the United States.[13]

We agree with the district court's finding below. FSIA is inapplicable to the case at bar because the transfers in question and the suit to recover those transfers occurred before Granfinanciera was nationalized. *Cf. Braka v. Bancomer*, 589 F.Supp. 1465, 1469 (S.D.N.Y.1984), *aff'd*, 762 F.2d 222 (2d Cir.1985) ("Bancomer was a state instrumentality . . . at the time of the lawsuit as well as at the time the act on which this suit is based took place."). Granfinanciera was not an instrumentality of the Colombian government at time of the transactions and thus would not be protected by the provisions of FSIA. Further, Granfinanciera did not prove that the transactions in question were governmental in nature and therefore protected. *See* H.R. No. 1487, 94th Cong., 2d Sess. 17, *reprinted in* 1976 U.S.Code Cong. & Admin.News 6604, 6616 (legislative history of FSIA).

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[12]28 U.S.C. Sec. 1603(b) reads:

An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

[13]*See* 28 U.S.C. Sec. 1604.

C. RIGHT TO A JURY TRIAL

We turn finally to the defendants' demand for a jury trial. This presents two thorny issues; whether a defendant has a right to a jury trial where the bankruptcy trustee seeks to avoid transfers of money by the debtor to the defendants and, if the right does exist, whether a bankruptcy court has authority to conduct a jury trial in a core proceeding?[14]

A defendant's right to a jury trial may arise either from the seventh amendment to the United States Constitution or from the statute which authorized the trustee's suit. *In re Graham*, 747 F.2d 1383, 1387 (11th Cir.1984); *Sibley v. Fulton DeKalb Collection Service*, 677 F.2d 830, 832–33 (11th Cir.1982). Because it may be quickly disposed of, we shall first discuss the possibility of a statutory right.

The cause of action sued upon by the trustee was brought under 11 U.S.C. Sec. 548(a)(2), the "constructive" fraud provision of the Bankruptcy Code. Section 548(a)(2) does not provide for a jury trial. Section 1480 of Title 28 of the 1978 Bankruptcy Reform Act did provide for jury trials, preserving any right to a trial by jury that existed prior to the enactment of the Act. Section 1480 was repealed, however, by the enactment of Sec. 1411 of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"). *See* Committee Note to abrogation of Rule 9015, Proposed Bankruptcy Rules, *reprinted in* 2 W.H. Drake & A.L. Mullins, Jr., *Bankruptcy Practice*, Appendix C, AC–178 (1987) (amendments become effective August 1, 1987); *In re McLouth Steel Corp.*, 55 B.R. 357, 362 (E.D.Mich.1985); *In re O'Bannon*, 49 B.R. 763, 768 and n. 15 (Bankr.M.D.La.1985); King, *Jurisdiction and Procedure Under the Bankruptcy Amendments*, 38 Vand.L.Rev. 674, 703 (1985). Section 1411

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[14]"The right to a jury trial in bankruptcy matters is not very clear." Cowans on Bankruptcy, Sec. 1.6 (1986).

affords jury trials only in personal injury or wrongful death suits. *See* Committee Notes, *supra.* This section has prospective effect and does not apply to cases pending on July 10, 1984, the effective date of BAFJA. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98–353, Sec. 122(b). The underlying bankruptcy action from which this dispute arose was filed before July 10, 1984, *see In re Harbour,* 59 B.R. 319, 324–25 (W.D.Va.1986), and the trustee's claim clearly is not for personal injury or wrongful death. There is, therefore, no statutory right to a jury trial in the case at bar.

The seventh amendment to the United States Constitution states: "In suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved. . . ." This amendment extends the right not only to suits existing in common law at the time the amendment was adopted, but also to any suit which is not of equity or admiralty jurisdiction. *Parsons v. Bedford,* 28 U.S. (3 Pet.) 433, 446–47, 7 L.Ed. 732 (1830). *See also Curtis v. Loether,* 415 U.S. 189, 192–93, 94 S.Ct. 1005, 1007–08, 39 L.Ed.2d 260 (1974).

The cause of action in the case at bar was to avoid three fraudulent transfers. Jury trials are not required in actions to recover fraudulent conveyances. *See In re Graham,* 747 F.2d at 1387; *In re Newman,* 14 B.R. 1014, 1015 (Bankr.S.D.N.Y.1981); *In re Hause,* 10 B.R. 628, 629 (Bankr.D.Mass.1981); *In re Fleming,* 8 B.R. 746, 749 (Bankr.N.D.Ga.1980); *Towers v. Titus,* 5 B.R. 786, 791 (N.D.Cal.1979). *See also In re Glen Otis,* 13 B.R. 279 (Bankr.N.D.Ga.1981) (jury trial denied in trustee's action to recover a voidable preference). Defendants contend that because the ultimate relief granted was monetary, the trustee's claim was "legal" and, therefore, they have a right to a jury trial. The Supreme Court in *Curtis, supra,* found that not every award of monetary relief is necessarily "legal"

in nature. 415 U.S. at 196, 94 S.Ct. 1009. (Supreme Court, in granting jury trial in action for damages and injunctive relief under Title VII of the Civil Rights Act of 1964, distinguished administrative and bankruptcy proceedings involving complex statutory schemes from "ordinary civil actions"). *Cf. In re Wencl,* 71 B.R. 879, 883 and n. 2 (Bankr.D.Minn.1987) ("[A] thorough examination of plaintiff's cause of action [is required], rather than focus[ing] solely on nature of relief sought in literal language of prayer for relief." Distinguishing between fraudulently conveyed property and the value of the property or a fraudulently conveyed sum of money is indefensible.). "Monetary relief may flow from an equitable claim without acquiring a legal character." *In re Fleming,* 8 B.R. at 749–50, *quoting Towers v. Titus,* 5 B.R. at 794–95. For example, no right to a jury trial exists when backpay is sought in a Title VII action, 42 U.S.C. Sec. 2000e *et seq.*, because it is an integral part of the equitable remedy of reinstatement. *Slack v. Havens,* 522 F.2d 1091, 1094 (9th Cir.1975).

The trustee sought to avoid the fraudulent transfers made by C & S to Granfinanciera and Medex and appealed to the bankruptcy court's equitable discretion to grant "such other relief as is just and proper" in order to satisfy the ends of justice. That the court chose to grant monetary relief did not change the equitable nature of the cause of action.

Moreover, bankruptcy itself is equitable in nature and thus bankruptcy proceedings are inherently equitable. *See In re Major Tire Co.,* 64 B.R. 305, 306 (Bankr.N.D.Ga.1986); *In re Durbin, Inc.,* 62 B.R. 139, 145 (S.D.Fla.1986). A cause of action to avoid a fraudulent transfer is a "core proceeding." 28 U.S.C. Sec. 157(b)(2)(H). A core proceeding is a proceeding created by the Bankruptcy Code and is brought in a bankruptcy court, and thus is inherently equitable in nature. *See Merrill v. Walter E. Heller & Co.,* 594 F.2d 1064, 1065 (5th Cir.1979) (no constitutional right to a jury trial in

bankruptcy on a dischargeability issue), *Baldwin-United Corp. v. Thompson*, 48 B.R. 49, 56 (Bankr. S.D.Ohio 1985) (no constitutional right to jury trial in core proceeding); King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 Vand.L. Rev. at 704 (no right to jury trial in core proceeding).

This is in accord with *Katchen v. Landy*, 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966) where the Supreme Court stated "[t]he Bankruptcy Act, passed pursuant to the power given to Congress by Art. I, Sec. 8, of the Constitution to establish uniform laws on the subject of bankruptcy, converts a creditor's legal claims into an equitable claim. . . ."[15] *Id.* 382 U.S. at 336–37, 86 S.Ct. at 476. If pursuant to this constitutional power, Congress may convert a creditor's legal right into an equitable claim and displace any seventh amendment right to trial by jury, Congress may likewise treat other core proceedings in bankruptcy such as actions to avoid fraudulent transfers or preferences. *See In re Southern Indus. Banking Corp.*, 66 B.R. 370, 375 (Bankr.E.D.Tenn.1986). "Congress may accommodate the right to a trial by jury to the need for expeditious proceedings." *Best Pack Seafood*, 45 B.R. 194, 195 (Bankr.D.Me.1984). *See also In re Hendon Pools of Michigan, Inc.*, 57 B.R. 801, 803 (S.D.Mich.1986) (no right to jury trial to avoid preferential or fraudulent transfers, both core proceedings, since equitable jurisdiction of the bankruptcy court is invoked, bringing action within scope of *Katchen* holding). *Accord Acolyte Elec. Corp. v. City of New York*, 69 B.R. 155, (Bankr.E.D.N.Y.1986); *In re Associated Grocers of Nebraska Cooperatives, Inc.*, 62 B.R. 439 (D.Neb.1986); *In re*

[15] *Katchen v. Landy* remains good law as evinced by its recent invocation as precedent by the Supreme Court in sustaining the jurisdiction of the Commodity Futures Trading Commission over state law counterclaims in reparation proceedings. *Commodity Futures Trading Commission v. Schor*, ___ U.S. ___, 106 S.Ct. 3245, 3258, 92 L.Ed.2d 675 (1986).

Harbor, supra; Hauytin v. Grynberg, 52 B.R. 657 (Bankr.D.Col.1985); 1 Collier on Bankruptcy, Par. 3.01(7)(b)(i) (15th ed. 1986). Congress enacted the Bankruptcy Code to provide a prompt resolution of all bankruptcy causes of action in order to expedite the settlement of the debtor's estate. Jury trials would "dismember" the statutory scheme of the Bankruptcy Act. *Curtis*, 415 U.S. at 195, 94 S.Ct. at 1009.

Accordingly, the defendants' demands for a jury trial must be denied. We, therefore, need not determine whether a bankruptcy court has authority to conduct a jury trial.[16]

III. CONCLUSION

Both the bankruptcy and district courts had personal jurisdiction over defendants Granfinanciera and Medex. FSIA is inapplicable in the case at bar. Neither defendant has a right to a jury trial. AFFIRMED.

[16] The recent abrogation of Bankruptcy Rule 9015, the mechanism by which a bankruptcy court may have conducted a jury trial, casts doubt that the possibility exists. *See* Committee Note to Abrogation of Rule 9015, Proposed Bankruptcy Rule, *reprinted in* 2 W.H. Drake & A.L. Mullins, Jr., *Bankruptcy Practice* Appendix C, AC–178 (1987) (amendments became effective August 1, 1987).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1292-CIV-KING

GRANFINANCIERA, S.A., and MEDEX, LTDA.,

Defendants/Appellants,

vs.

PAUL C. NORDBERG, as Creditor Trustee
for the Estate of the Debtor, Chase & Sanborn Corp.
f/k/a General Coffee Corporation,
Plaintiff/Appellee.

ORDER AFFIRMING THE DECISION OF THE BANKRUPTCY COURT

THIS CAUSE arises before the Court upon the Defendants/Appellants' notice of Appeal from the Final Judgment dated April 16, 1986, entered by the Honorable Thomas C. Britton of the United States Bankruptcy Court for the Southern District of Florida (Bankruptcy Court). This Court has appellate jurisdiction Pursuant to 28 U.S.C. sec. 158.

Accordingly, after a careful review of the record, and the Court otherwise being fully advised in the premises, the Court finds:

PROCEDURE

The Plaintiff Paul C. Nordberg as trustee for the estate of the Debtor Chase & Sanborn (C&S) filed this action in the Federal District Court for the Southern District of Florida (CASE NO. 85-1723-CIV-EATON) to set aside three allegedly

fraudulent transfers of funds from the accounts of the debtor to accounts of the Defendants. By Order of July 12, 1985 Judge Eaton referred this case to the Bankruptcy Court pursuant to this Court's master order of reference in bankruptcy cases. Trial was held in this case and Judge Britton entered his memorandum decision on April 16, 1986. The Bankruptcy Court found that the transfers in question were made at a time that the debtor was insolvent as defined by sec. 101(29) and further that they were made without consideration from the Defendants. Thus the Bankruptcy Court found that the transfers in question constituted fraudulent transfers under 11 U.S.C. sec. 548 and were recoverable by the trustee under sec. 550(a).

FACTS

The transfers in question totaled 1.68 million dollars and occurred within one year of the debtors filing in bankruptcy. The fraudulent transfers in this case consist of: (1) $1,500,000 dollars transferred by wire on October 21, 1982 from the bank account of C&S in Banque Worms, New York Branch to Granfinanciera's bank account in Banco Real in Miami; (2) a cashiers check in the amount of $100,000 purchased on December 15, 1982 by C&S from Royal Trust bank in Miami and delivered to Defendant MEDEX for deposit in its account in Banco Real of Miami; (3) another cashiers check purchased from the debtors bank, Royal Trust of Miami, in the amount of $80,000 dated December 16, 1982 and delivered to Defendant MEDEX for deposit in its account in Banco Real in Miami. The transfers in question either took place or were orchestrated by the debtor in Miami. All the funds in question were deposited to the Miami bank accounts of the Defendants.

MEMORANDUM

The standard of review to be applied when reviewing a decision of the Bankruptcy Court is the "clearly erroneous"

standard. The factual findings made by the bankruptcy judge should not be overturned unless such findings are determined to be clearly erroneous.

Three issues raised by the Defendants merit discussion.

PERSONAL JURISDICTION

The Defendants contend that they lacked the requisite minimum contacts with the Southern District so as to be within the personal jurisdiction of this Court. Judge Britton found in his Order of February 21, 1986 denying the defendants motion to dismiss and to quash service:

> The [complained of] . . . transfers were made from the debtor's New York bank in U.S. currency to the bank accounts of each defendant in a Miami bank. The entire transaction occurred in this country and was completed in this District . . . . The fact that each defendant, though then maintaining a bank account in Miami employed for the purpose of receiving these transfers, was then and is now domiciled in Colombia does not divest this Court of jurisdiction.

The evidence presented by the Defendants at trial, of account transactions, established that they had conducted numerous international business transactions utilizing their bank accounts in Miami, New York, Chicago and San Francisco. (Trial Transcript of February 20, 1986, pp. 118-121, 126, 133, 138-147). The record supports the findings of personal jurisdiction over the defendants by the Bankruptcy Court.

PROCESS

The Defendants argue that service of process in the case was improper because the summonses were issued by the clerk of the U.S. District Court rather than the Bankruptcy Court and that service was not properly made on the defendant corporations.

The case at bar was originally filed in the District Court and assigned to Judge Eaton. Judge Eaton stayed the case and referred it to the Bankruptcy Court, pursuant to the master order of reference, on July 12th, 1985. The actual transfer of the case file was substantially delayed. The case file eventually arrived at the Bankruptcy Court on January 22nd, 1986 over six months later. Because of this delay the Plaintiff requested that summonses be issued by the District Court Clerk. Because the possession of the actual court file remained with the District Court for this extended period issuance of the summonses by the District Clerk was proper.

The Defendants further claim that the actual service of the summonses was insufficient. It appears that the process server attempted to personally serve the managing officer of the Defendant corporations. When the officer refused to accept service and became hostile to the process server, the documents were left with the manager of the mail room of the Defendants. It is clear that the Defendants received actual notice of the pending case. As Judge Britton observed;

> [T]he attempted service was effective in the sense that it came almost immediately to the attention of each defendant as is demonstrated by the fact that each defendant almost immediately arranged to be represented by well qualified counsel who have appeared before this court. The essential purposes, therefore of the service of process has been accomplished.

The Court finds that the Bankruptcy Judge was correct in finding that service was proper and effective and that no prejudice befell the Defendants.

SOVEREIGN IMMUNITY

The final argument deals with the applicability of the Foreign Sovereign Immunities Act (FSIA) U.S.C. sec. 1602 et seq.. The Defendants argue that because the Defendants were nationalized by the Government of Colombia they are immune to suit. It is the Defendants burden under FSIA to show that: (i) Appellants were instrumentalities of the government of Colombia; and (ii) Appellants were not engaged in commercial activity. The Defendants have failed to meet this burden. This Act is not applicable to the case at bar for two reasons: Firstly, the transfers in question and the suit to recover those transfers occurred before the Defendants were nationalized. The Defendants were not instrumentalities of the Colombian government at the time of the transactions and thus would not be protected by the provisions of FSIA. Further the Defendants have not proven that the transactions in question were governmental in nature and therefore protected.

The Bankruptcy Court did not err in finding that the transactions in question were fraudulent under Section 548 and thus recoverable. The Bankruptcy Court exercised proper jurisdiction over both the case and parties. The Defendants had actual notice of the pending suit and had ample opportunity to fully and aggressively defend their position. Therefore it is:

ORDERED and ADJUDGED that the decision of the Bankruptcy Court be and hereby is AFFIRMED.

Done and Ordered in chambers at the United States Courthouse, Federal Courthouse Square, Miami, Florida this 14th day of August 1986.

JAMES LAWRENCE KING

JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-00889-BKC-TCB
CHAPTER 11

ADV. NO. 86-0043-BKC-TCB-A

In re:

CHASE & SANBORN CORP. f/k/a
GENERAL COFFEE CORP.,

Debtor.

PAUL C. NORDBERG, as Creditor Trustee for
the Estate of the Debtor, CHASE & SANBORN CORP.
f/k/a GENERAL COFFEE CORP.,

Plaintiff,

vs.

GRANFINANCIERA, S.A., a Colombian corporation,
and MEDEX, LTDA., a Latin American corporation,

Defendants.

MEMORANDUM DECISION

Plaintiff is a liquidating trustee for creditors appointed pursuant to a plan for bankruptcy corporate reorganization, which was confirmed by this court in August 1984. He seeks the avoidance and recovery for the creditors under 11 U.S.C.

§548(a)(2)(A)[1] and §550 of three transfers in the total amount of $1.68 million made by the debtor to the defendants in 1982. The trial was concluded on April 10.

The critical events are essentially undisputed and the facts are simple. Plaintiff is entitled to the relief he seeks.

On October 21, 1982 $1.5 million was transferred from the debtor's account in a New York bank, Banque Worms, to the account of the defendant, Granfinanciera, in a Miami bank, Banco Real. Because Banque Worms is not a member of the federal reserve system, the transfer was effected by wire through federal reserve banks.

On December 15, 1982 $100,000 was transferred from the debtor's account in a Miami bank, Royal Trust, by cashier's check to the account of the defendant, Medex, in a Miami bank, Banco Real.

On December 16, 1982 $80,000 was transferred from the debtor's account in Royal Trust Bank by cashier's check to Medex' account in Banco Real.

The debtor filed for bankruptcy on May 18, 1983. Therefore, the three transfers occurred within a year before bankruptcy.

At no time material to this action was the debtor indebted to either defendant nor did it receive any consideration from either defendant for any part of the three transfers.

At the time of the transfers the debtor was insolvent as that term is defined in §101(29).

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[1]Alternatively plaintiff sought recovery in count 2 under §548(a)(1) for alleged actual fraud. There is no evidence to support this count. It is dismissed with prejudice.

Its debts exceeded its assets by at least $26 million.

Section 548(a) (2) provides that:

> "The trustee may avoid any transfer of an interest of the debtor in property . . . that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily . . . (2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (B) (i) was insolvent on the date that such transfer was made. . ."

Section 550(a) provides that:

> "[T]o the extent that a transfer is avoided under section. . .548. . .of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from (1) the initial transferree of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee."

The defendants have not seriously disputed any of the foregoing findings. Instead, they have argued that (a) service of process was defective, (b) they were given inadequate time to defend themselves, (c) Granfinanciera, a Colombian financial institution:

> "possibly was nothing more than a mere depository or conduit through which the 1.5 million dollar transaction alleged in Plaintiff's Complaint flowed"

and (d) the debtor's estate has already recovered the $1.5 million and should not have a second recovery. Although none of these contentions merit the serious and protracted consideration each has received, I shall address each.

Service of process. Defendants' initial challenge of service filed February 11 (C. P. No. 21) was heard on February 14. It was denied that day. The Order on Defendants' Motion to Quash Service of Process and Motion to Dismiss (C. P. No. 56) states the basis for that ruling and need not be repeated here.

On February 20, when the trial of this matter began, defendants' witness testified that the individual with whom process was left was a "messenger boy" in charge of defendants' mail room and was not, therefore, an "officer, a managing or general agent" as those terms are used in Rule 4(i) (1) (C) *Fed. R. Civ. P.* under which service is claimed by plaintiff. Plaintiff subsequently amended its proof of service (C. P. No. 60) to show that process had been tendered to an individual who was an officer of one defendant and the manager of the other. He refused service and avoided service. Instead of merely throwing the process on the floor as he could have done, the process server left it with the agent in charge of defendants' mail room. Three weeks later defendants appeared through counsel moving to quash service. In addition, plaintiff again served the managing officer of each defendant on March 6 (C. P. No. 60).

The amended return of the original service has been authorized under Rule 4(h). (C. P. No. 57, page 157). I find no prejudice to any substantial right of either defendant. I also find that personal service was effected on the defendants on November 25, 1985 and was effected again on March 6. I am satisfied that each defendant received actual notice of this action in accordance with Rule 4(i) (1) (C) and neither has been prejudiced in any way by the manner in which service was effected. *Nowell v. Nowell*, 384 F.2d 951, 953 (5th Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *Frank Keevan & Son, Inc. v. Collier Steel Pipe & Tube, Inc.*, 107 F.R.D. 665 (S.D. Fla. 1985).

Inadequate time to defend. Defendants moved for a three-month continuance on February 20 (C. P. No. 42), the day of trial, nine months after the complaint was filed and three months after they were served. Ruling was reserved on the motion (C.P. No. 57, page 32). The proof of both parties was received, after which the trial was continued for one month to March 20 (C. P. No. 57, page 168). The continuance was requested and granted to give defendants a further opportunity to examine their own bank accounts to search for evidence that they had loaned money to the debtor and, therefore, that the three transfers were received in repayment of a debt owed by this debtor. (C. P. No. 57, pages 151-155). Such evidence would provide a defense under §548(c).

At the continued trial on March 20 defendants represented that a third party would probably settle plaintiff's claim and both parties requested and received another three weeks' delay to April 10.

On April 10, defendants acknowledged that the proposed settlement had collapsed and that they had found no evidence of any loan. Neither party requested any further delay. Additional evidence was received from defendants and the parties argued the case. I have also considered eight memoranda submitted by the parties. (C. P. Nos. 19, 24b, 26a, 38, 60, 63, 64 and 74.)

These defendants have received every reasonable opportunity to defend themselves.

Granfinanciera was a mere depository or conduit. In their final memorandum, defendants have argued that if Granfinanciera was a mere depository or conduit through whom a fraudulent transfer passed, but who received no benefit from the transfer (other than possibly a customary fee for its commercial services), the trustee is not entitled to any recovery from Granfinanciera. (C. P. No. 74).

Defendants rely upon decisions from five Circuits. Each of these cases was decided under the Act of 1898. Section 550 of the 1978 Reform Act, which is controlling here, was intended to expand the trustee's remedy to some extent at least. *Gropper v. Unitrac, et al. (In re Fabric Buys of Jericho, Inc.)*, 33 B.R. 334, 336-7 (Bankr. S.D. N.Y. 1983). There is, as yet, no Circuit decision construing §550. However, I do agree with defendants that §550 was not intended to provide the trustee with a windfall from an innocent bystander. I have recently followed *Fabric Buys of Jericho, supra*, which so holds, in *Metsch v. First Alabama Bank of Mobile (Colombian Coffee Co., Inc.)*, March 28, 1986. ADV No. 86-0086.

This defense is not applicable here. Defendants have not shown that they were mere conduits carrying out the debtor's instructions and that they received no benefit from the fraudulent transfer. On the contrary, it is clear that the day after it received the $1.5 million, Granfinanciera applied the funds to satisfy an obligation of a third party to Granfinanciera. There is no evidence of any relationship between the third party and the debtor. There is no evidence that the debtor directed or authorized that payment.

I agree with the plaintiff that the facts here are analogous to those in *Nordberg v. Republic National Bank of Miami (In re Chase & Sanborn Corp.)*, 51 B.R. 739, (Bankr. S.D. Fla. 1985), where the bank also applied the fraudulent transfer to satisfy a debt owed it by a third party.

A second recovery. In oral argument, defendants have argued that the debtor has already recovered the $1.5 million it paid to Granfinanciera. The argument is not supported by this record and stems from defendants' misinterpretation of a bank record. It is clear from the evidence before me that the debtor's estate remains $1.68 million poorer as a result of the three transfers in question here.

As is required by B.R. 9021(a), a separate judgment will be entered in favor of the plaintiff against Granfinanciera for $1.5 million and against Medex for $180,000. Costs may be taxed on motion.

DONE and ORDERED in Miami, Florida this 16th day of April, 1986.

/s/ THOMAS C. BRITTON
Thomas C. Britton
Chief Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-00889-BKC-TCB
CHAPTER 11

ADV. NO. 86-0043-BKC-TCB-A

In re:

CHASE & SANBORN CORP. f/k/a
GENERAL COFFEE CORP.,

Debtor.

PAUL C. NORDBERG, as Creditor Trustee for
the Estate of the Debtor, CHASE & SANBORN CORP.
f/k/a GENERAL COFFEE CORP.,

Plaintiff,

vs.

GRANFINANCIERA, S.A., a Colombian corporation,
and MEDEX, LTDA., a Latin American corporation,

Defendants.

JUDGMENT

This matter came before the court on the trustee's complaint seeking to avoid fraudulent transfers under 11 U.S.C. §548(a) within the scope of §550(a). A separate memorandum decision incorporating findings and conclusions has been entered this day.

Accordingly, it is Ordered that count 2 of the complaint is dismissed with prejudice. It is further ordered that (1) the trustee shall recover from the defendant Granfinanciera the sum of $1.5 million and (2) the trustee shall recover from the defendant Medex the sum of $180,000. Costs may be taxed on motion.

DONE and ORDERED at Miami, Florida, this 16th day of April, 1986.

/s/ THOMAS C. BRITTON

Thomas C. Britton
Chief Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-00889

ADV. NO. 86-0043

In the Matter:

of

CHASE & SANBORN CORP.
f/k/a GENERAL COFFEE CORP.,

Debtor.

PAUL C. NORDBERG,

Plaintiff,

v.

GRANFINANCIERA, S.A., and
MEDEX, LTDA.,

Defendants.

COMPLAINT FOR FRAUDULENT TRANSFER AND RECOVERY OF FUNDS

February 20, 1986

The above-entitled cause came on for Hearing before the Honorable Thomas C. Britton, one of the Judges of the United States Bankruptcy Court, Room 1406, 51 Southwest 1st Avenue, Miami, Dade County, Florida, at a session of said

Court commencing at 9:30 o'clock a.m. on Thursday, February 20, 1986, and the following proceedings were had:

[THE COURT]: I reserve the discretion to sustain your objection and exclude the deposition should I find merit in Mr. Ezell's objection. If I do not, I will consider it.

Mr. Ezell, you have asked me to require this plaintiff to offer not the entire deposition, but only those specific lines or pages or whatever that he considers critical and important.

I appreciate that if we had a jury here, that it would be necessary perhaps to do that and perhaps expedient to do it as well, but without a jury it is so much easier for me to have the entire document in front of me, so that I can understand what the background is for the several objections and what is offered and what is not offered.

Are there any other objections to this deposition that you have not referred to so far?

MR. EZELL: Yes, sir. The Court may not have had an opportunity to review our responsive pleadings in this action, but we did request a jury trial on all triable issues.

THE COURT: This is an action to avoid a fraudulent transfer, a core action that originally, under the English common law, as I understand it, was a non-jury issue. What is the basis for a jury demand or what issue is triable by a jury here?

MR. EZELL: It is the factual issues in this case, Judge, and--

THE COURT: It is your position that an action to avoid a fraudulent transfer is entitled to a jury because there are factual disputes?

MR. EZELL: Yes, sir.

THE COURT: I will overrule that request for demand for a jury trial. I don't think that there are any triable jury issues in this particular action. Have I overlooked something, do you think?

MR. EZELL: Is the Court disposed to entertain a motion at this time?

THE COURT: Yes.

MR. EZELL: We would move for a directed verdict, Judge, based upon the offering of the Banque Worms' deposition. Basically, this motion is that there is a claim that the debtor has somehow lost $1-1/2 million.

Banque Worms said that they loaned this particular debtor $1-1/2 million. Banque Worms' own testimony is they have been paid back except for $60,000.

Now, the question then comes in, has a substantial consideration been given, has a valuable consideration been given. The documents that they

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 85-1723

IN RE:

CHASE & SANBORN CORP.
f/k/a GENERAL COFFEE
CORPORATION

Debtor.

PAUL C. NORDBERG, as Creditor
Trustee for the Estate of the
Debtor, CHASE & SANBORN
CORPORATION f/k/a GENERAL
COFFEE CORPORATION,

Plaintiff,

v.

GRANFINANCIERA, S.A., a
Colombian corporation, and
MEDEX, LTDA., a Latin American
corporation,

Defendants.

COMPLAINT

Plaintiff, Paul C. Nordberg, as Creditor Trustee ("Creditor Trustee") for the Estate of the Debtor, Chase & Sanborn Corporation f/k/a General Coffee Corporation

("C&S"), sues the Defendants and alleges upon information and belief as follows:

PARTIES, JURISDICTION AND VENUE

1. This is an action to avoid fraudulent transfers and to recover those transfers for the benefit of the C&S estate. Jurisdiction and venue of this action lie with this Court pursuant to 28 U.S.C. §§1334, 1409. Although 28 U.S.C. §157 specifies that an action may be a core proceeding arising in the case of *In re Chase & Sanborn Corporation*, Chapter 11, Case No. 83-00889-BKC-TCB, pending in the United States Bankruptcy Court for the Southern District of Florida, recent precedent suggests that transfer avoidance actions may only be heard and decided by judges serving pursuant to Article III of the United States Constitution, *i.e.*, federal district court judges. *See, In re Associated Grocers of Nebraska Cooperative, Inc.*, 46 B.R. 173 (Bkrtcy. D. Neb. 1985).

2. On May 18, 1983, C&S filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Florida, Case No. 83-00889-BKC-TCB.

3. A Plan of Reorganization was confirmed by the Bankruptcy Court in August, 1984. Under its terms, and those of the Creditor Trust Agreement incorporated therein by reference, all assets of C&S that remained after the sale of its physical plants, trademarks and ongoing business, were transferred to the Creditor Trustee. The assets now vested in the Creditor Trustee include, *inter alia*, causes of action for preferences, fraudulent conveyances and receivables. Plaintiff is therefore the duly appointed, qualified and acting Creditor Trustee of the estate of C&S.

4. Defendant Granfinanciera S.A. is a Colombian corporation which was, at all material times herein, engaged

in business with Alberto Duque Rodriguez ("Duque"), and his affiliates, including C&S, either directly or indirectly through Defendant Medex Ltda., a Latin American corporation owned and controlled by Granfinanciera, S.A. and which maintained bank accounts in Miami, Florida.

GENERAL ALLEGATIONS

5. On or about May 19, 1983, several other persons and companies related to C&S also filed petitions for reorganization with the United States Bankruptcy Court for the Southern District of Florida, *i.e.*, Alberto Duque Rodriguez (Case No. 81-00903-BKC-TCB), Colombian Coffee Company (Case No. 83-00904-BKC-TCB), Domino Investments, Ltd. (Case No. 83-00902-BKC-TCB) and Allsun Juices, Inc., which case is administered by the United States Bankruptcy Court for the Middle District of Florida.

6. All such persons and companies were affiliates of and/or related to C&S in that:

(a) C&S was the owner of the stock of Allsun Juices, Inc. ("Allsun").

(b) Domino Investments, Ltd. ("Domino") owned the stock of C&S.

(c) Duque owned the stock of Domino.

(d) Duque and members of his family owned the stock of Colombian Coffee Company, Inc. ("CCC").

7. Upon information and belief, Duque and members of his family also owned the stock of Luis A. Duque Pena & Hijos, Limitada ("Limitada"), a Colombian company.

8. Upon information and belief, on or about the summer of 1982, Limitada, the Duque family and its affiliates began to experience financial difficulties in Colombia.

9. As a result of these difficulties, Duque and his family caused to be transferred substantial amounts of money from C&S to or for the benefit of Limitada, the Duque family or its affiliates or creditors on or within one year from the date of the filing of the petition for reorganization by C&S.

10. Defendants, which were creditors of Limitada, CCC, the Duque family or its affiliates, received the following transfers from C&S on or about the following dates:

Date	Amount	Method of Payment
10/20/82	$1,500,000	Transfer from C & S account at Banque Worms, New York City, New York
12/15/82	$ 100,000	Cashier's check drawn on C & S account with Royal Trust Bank, Miami, Florida
12/16/82	$ 100,000	Cashier's check drawn on C & S account with Royal Trust Bank, Miami, Florida

11. At the time of each of these transfers, C&S owed no obligation to Defendants and received no consideration and less than a reasonably equivalent value in exchange for its payments to the Defendants.

COUNT I

12. Plaintiff realleges and incorporates herein the allegations set forth in Paragraphs 1-11 above.

13. The transfers complained of herein are transfers of property of C&S made on or within one year of the filing of its petition for reorganization under the Bankruptcy Code.

14. C&S received no consideration or less than a reasonably equivalent value in exchange for its transfers to the Defendants.

15. On the dates of such transfers to Defendants, C&S was insolvent or became insolvent because of the transfers.

16. On the dates of such transfers to Defendants, C&S was engaged in business or was about to engage in business or transactions for which any property remaining with C&S was an unreasonably small capital.

17. On the dates of such transfers to Defendants, C&S intended to incur or believed that it would incur, debts that would be beyond the ability of C&S to pay as such debts matured.

18. The transfers are fraudulent conveyances which may be avoided pursuant to 11 U.S.C. §548(a)(2) and which may be recovered from the Defendants for the benefit of the estate of C&S pursuant to 11 U.S.C. §550(a).

COUNT II

19. Plaintiff realleges and incorporates herein the allegations set forth in Paragraphs 1-18 above.

20. Upon information and belief, C&S made the transfers complained of herein with the actual intent to hinder, delay and defraud the other creditors of C&S.

21. The transfers complained of herein are fraudulent conveyances which may be avoided pursuant to 11 U.S.C.

§548(a)(1) and which may be recovered from the Defendants for the benefit of the estate of C&S pursuant to 11 U.S.C. §550(a)

WHEREFORE, the Creditor Trustee demands judgment against the Defendants jointly and severally, as follows:

(i) As to Count I, avoiding the payments to the Defendants as fraudulent transfers pursuant to 11 U.S.C. §548(a)(2), and awarding damages to the estate of C&S in an amount of not less than $1,700,000 pursuant to 11 U.S.C. §550(a);

(ii) As to Count II, avoiding the payments to the Defendants as fraudulent transfers pursuant to 11 U.S.C. §548(a)(i), and awarding damages to the estate of C&S in an amount not less than $1,700,000 pursuant to 11 U.S.C. §550(a);

(iii) Awarding the estate of C&S the costs and expenses of this action; and

(iv) Granting the estate of C&S such other and further relief as is just and proper, such as interest from the date of each transfer complained of herein.

HORNSBY & WHISENAND
Attorneys for Paul Nordberg,
Creditor Trustee for Chase
& Sanborn Corporation

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. §1411

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

(b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

28 U.S.C. §1480

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.

(b) The bankruptcy court may order the issues arising under section 303 of title 11 to be tried without a jury.

11 U.S.C. §548

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation viodable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law

permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section—

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, takes for value to the extent of such payment; and

11 U.S.C. §550

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the viodability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(d)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of—

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes—

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(e) An action or proceeding under this section may not be commenced after the earlier of—

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAY 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1716

In The

Supreme Court of the United States

October Term, 1987

GRANFINANCIERA, S.A.
a Colombian corporation,

and

MEDEX, LTDA.,
a Latin American corporation,

Petitioners,

v.

PAUL C. NORDBERG, Creditor Trustee
for the Estate of Chase & Sanborn Corporation,
f/k/a General Coffee Corp.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED (RESTATED)

Respondent, Paul C. Nordberg, as creditor trustee for the estate of Chase & Sanborn Corporation, filed an adversary action in the Chapter 11 proceedings below against petitioners, requesting avoidance of three fraudulent conveyances made to petitioners by the debtor before bankruptcy. The bankruptcy court found the transfers to be fraudulent conveyances under 11 U.S.C. 548(a)(2) and entered an appropriate judgment in favor of respondent, avoiding the transfers in the amount of $1,680,000. After trial had commenced before the Court without a jury, and during presentation of respondent's case, petitioners orally requested a jury trial on the sole basis that there were factual disputes in the case. The Court properly overruled the request.

The proper characterization of the questions presented are:

1. Whether conflict exists among the circuit courts of appeal regarding a seventh amendment right to a jury trial in a constructive fraudulent conveyance action under the Bankruptcy Code in view of the structure of the bankruptcy system established by Congress under the 1978 Bankruptcy Reform Act and the Bankruptcy Amendments and Federal Judgeship Act of 1984.

2. Whether a constructive fraudulent transfer action in a bankruptcy case which is traditionally a non-jury equitable proceeding is transformed into a legal claim for seventh amendment purposes simply because the ultimate relief awarded is monetary.

RULE 28.1 LIST

Respondent, Paul C. Nordberg, is the creditor trustee for the estate of Chase & Sanborn Corporation, f/k/a General Coffee Corporation. General Coffee Corporation is a debtor-in-possession under the United States Bankruptcy Code. Respondent was the plaintiff-appellee in the court below. The parent company, subsidiaries and affiliates of General Coffee Corporation included Domino Investments, Ltd. and Allsun Juices, Inc.

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No. 87-1716

In The
Supreme Court of the United States
October Term, 1987

GRANFINANCIERA, S.A.
a Colombian corporation,

and

MEDEX, LTDA.,
a Latin American corporation,

Petitioners,

v.

PAUL C. NORDBERG, Creditor Trustee
for the Estate of Chase & Sanborn Corporation,
f/k/a General Coffee Corp.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent, Paul C. Nordberg, creditor trustee for the estate of Chase & Sanborn Corporation, f/k/a General Coffee Corporation, respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed by petitioners, Granfinanciera, S.A. and Medex, Ltda., be denied.

STATEMENT OF THE CASE

Respondent Nordberg is the creditor trustee for the estate of the debtor ("Trustee"), Chase & Sanborn Cor-

poration formerly known as General Coffee Corporation ("General Coffee"). The Trustee was charged *inter alia* with the duty of recovering and marshalling all of the remaining assets of the estate including property of General Coffee fraudulently transferred prior to the filing of the bankruptcy petition. In performing this duty the Trustee favorably resolved most of the more than seventy (70) actions to recover fraudulent or preferential transfers for the benefit of the estate, none of which were tried by a jury. This action is one of the many adversary actions filed by the Trustee on May 17, 1985, seeking to avoid fraudulent transfers.

When suit was filed in May, 1985, petitioners were privately owned international finance companies which engaged in foreign exchange and other business transactions between the United States and Colombia. The Trustee's complaint alleged that the fraudulent transfers received by petitioners were made by General Coffee, a Miami based coffee company owned and controlled by Alberto Duque. It was alleged that Duque misused the assets of General Coffee by diverting its funds to Duque's creditors in Colombia.

Three illegally diverted transfers formed the basis of the Trustee's adversary action in the bankruptcy proceedings: (1) a $1,500,000 wire transfer from General Coffee to Granfinanciera's bank account in Miami; (2) a cashier's check for $100,000 purchased by General Coffee and delivered to Medex for deposit in Medex's Miami bank account; and (3) another cashier's check for $80,000 purchased by General Coffee and delivered to Medex for deposit in Medex's Miami bank account.

The Trustee's complaint sought avoidance of each of the transfers as fraudulent transfers pursuant to the constructive fraudulent conveyance provisions of the Bankruptcy Code, 11 U.S.C. § 548(a)(2) (1986) and invoked the equitable power of the court by requesting "such other and further relief as is just and proper." (App. 41)[1]

Granfinanciera and Medex answered the Complaint, essentially denying the allegations and raised a variety of affirmative defenses, some of which were equitable in nature. Numerous motions were filed by petitioners asserting lack of personal and subject matter jurisdiction by the bankruptcy court, all of which were denied and have been affirmed on two appeals—one by the district court and the other by the United States Court of Appeals for the Eleventh Circuit.

Petitioners did not challenge any denial of their alleged right to a trial by jury by oral or written motion before trial began. Directly before petitioners moved for a directed verdict and during presentation of the Trustee's case, petitioners for the first time brought to the bankruptcy court's attention that a jury trial had been requested. (App. 34-35). Petitioners' sole ground for requesting a jury trial was that "fraudulent conveyance actions involve factual disputes thus requiring a jury trial." (App. 34-35). The bankruptcy court properly overruled petitioners' request (App. 35).

At trial, petitioners did not seriously dispute that General Coffee had transferred and the petitioners had re-

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[1] App. followed by page reference refers to Petitioners' Appendix in their Petition for a Writ of Certiorari.

ceived the wire transfer for $1,500,000 and two cashier's checks totalling $180,000. The only two defenses raised by petitioners at trial were: (1) that they were a "mere conduit" for the funds and received no benefit; and (2) that General Coffee had already recovered the $1,500,000 wire transfer made to Granfinanciera. The bankruptcy court properly rejected the "mere conduit" defense finding that petitioners presented no evidence of any relationship between the third party exporter and the debtor, which according to the bankruptcy court supported the Trustee's proof that there was no consideration for the transfer (App. 29). The bankruptcy court summarily rejected the second defense noting that petitioners' argument stemmed from their misinterpretation of a bank record (App. 29). The bankruptcy court, having found the Trustee's proof established the necessary elements to support a constructive fraudulent conveyance under the provisions of 11 U.S.C. § 548(a)(2) (1986), and having found petitioners' defenses to be without merit, entered judgment in favor of\the Trustee for $1,680,000, the total of the three fraudulent transfers.

On petitioners' appeal to the district court, all of the findings were affirmed. In affirming the judgment of the bankruptcy court, the district court declined to even address the jury trial issue.

Petitioners appealed to the Eleventh Circuit on three grounds: (1) lack of personal jurisdiction; (2) lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act; and (3) denial of right to trial by jury. On all three issues the Eleventh Circuit affirmed the decision of the district court.

The Eleventh Circuit held that petitioners had no statutory right to a jury trial. Further, because the action to avoid a fraudulent transfer is a "core proceeding," created by the Bankruptcy Code and brought in a bankruptcy court, and because the action was inherently equitable in nature, the Eleventh Circuit concluded no constitutional right to a jury trial existed. The Eleventh Circuit relied on this Court's decision in *Katchen v. Landy*, 382 U.S. 323 (1966), in determining that no right to a jury trial exists in a bankruptcy court fraudulent conveyance action. In *Katchen*, this Court held that "[t]he Bankruptcy Act, passed pursuant to the power given to Congress by Act I, Sec. 8, of the Constitution to establish uniform laws on the subject of bankruptcy, converts a creditor's claims into an equitable claim . . ." 382 U.S. at 336. Relying on this Court's instruction in *Katchen v. Landy*, the Eleventh Circuit logically concluded that "if pursuant to this constitutional power, Congress may convert a creditor's legal right into an equitable claim and displace any seventh amendment right to trial by jury, Congress may likewise treat other core proceedings in bankruptcy such as actions to avoid fraudulent transfers or preferences." The Eleventh Circuit observed that Congress, pursuant to its constitutional power, "enacted the Bankruptcy Code to provide a prompt resolution of all bankruptcy causes of action in order to expedite the settlement of the debtor's estate" and thus determined that from a policy perspective "jury trials would dismember the statutory scheme of the Bankruptcy Act," created by Congress. Concluding that petitioners had no constitutional right to a jury trial, the court affirmed the judgment of the district court.

REASONS FOR DENYING THE WRIT

I.

THE CIRCUIT COURT'S SEVENTH AMENDMENT ANALYSIS IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND WITH CONGRESS' ENACTMENT OF THE 1978 BANKRUPTCY REFORM ACT AND THE BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984

The combined effect of this Court's decisions and Congress' enactment of the 1978 Bankruptcy Reform Act ("1978 Act"), and the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("1984 Act"), compels the conclusion that a fraudulent conveyance claim is a bankruptcy proceeding entirely within the traditional, equitable bankruptcy forum, free of the seventh amendment's requirement that all suits at common law shall be tried by a jury.

In *Katchen v. Landy*, 382 U.S. at 336, relied upon by the Eleventh Circuit, this Court affirmed the long-standing principle that bankruptcy proceedings are inherently equitable. No right to jury trial exists in a "pure" bankruptcy proceeding. The equitable jurisdiction vested in the bankruptcy court is necessary to administer the assets of the estate in a "characteristically . . . summary fashion." 382 U.S. at 327. Recognizing the special nature of bankruptcy proceedings, Justice White made clear:

> When Congress enacted general revisions of the bankruptcy laws in 1898 and 1938, it gave "special attention to the subject of making [the bankruptcy laws] inexpensive in [their] administration." Moreover this Court has long recognized that a chief purpose of the bankruptcy laws is "to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period," and that provision for summary disposition, "without regard to usual modes of trial attended by some necessary delay," is one of the means chosen by Congress to effectuate that purpose.

Id. at 328-29 (citations omitted).

Although *Katchen v. Landy* did not expressly overrule *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932), a case relied upon by petitioners, the doctrine that actions within bankruptcy proceedings are proceedings in equity, outside the scope of the seventh amendment, remains wholly intact.

The Eleventh Circuit's decision does not conflict with *Schoenthal*, as Petitioners suggest. *Schoenthal* was decided under the now discarded bankruptcy scheme of bifurcated jurisdiction. Under the old jurisdictional provisions, actions against third parties in general, and avoidance actions in particular, were not part of the bankruptcy court's limited summary jurisdiction, *i.e.*, collateral cases to be tried and decided before a non-bankruptcy court. Indeed, *Schoenthal* went no further than to hold that a preferential transfer action under the 1898 Act was a plenary proceeding to be tried in an Article III court and that the availability of a jury trial must be determined independently of the bankruptcy proceeding.

Schoenthal, therefore did not hold that preference actions tried as part of a bankruptcy proceeding were "legal," but simply echoed long standing jurisprudence that bankruptcy proceedings are "equitable" and prefer-

ence actions which are tried outside of bankruptcy are to be analyzed under a seventh amendment historical analysis.

Petitioners' argument that the Eleventh Circuit misapplied this Court's seventh amendment analysis ignores the essential key to the Circuit Court's ruling: a fraudulent conveyance action after 1978 is a statutory creation of Congress under the Bankruptcy Code. In determining that fraudulent conveyance actions are actions which are central to the "core" of the overall bankruptcy proceeding, Congress sought to provide for an expeditious resolution of these disputes so that the assets of the estate could be recovered and would become quickly part of the estate under bankruptcy administration. Prosecuted as a "core" proceeding, this type of action is therefore inextricably tied to the overall equitable character of the bankruptcy proceeding. (App. 15).

Until the Bankruptcy Act of 1978, Congress had purposely excluded the actions of a trustee to avoid and recover fraudulent and preferential transfers from its designation of matters considered "pure" bankruptcy or "core" bankruptcy proceedings. *See Bardes v. First National Bank of Hawarden*, 178 U.S. 524 (1900). It just as deliberately reversed this approach when it enacted the 1978 Act and the subsequent 1984 Act.[2] In each Act, Congress sought to eliminate a major defect in bankruptcy litigation—the time and resources wasted in jurisdictional squabbles over whether disputes were to be resolved by summary or plenary proceedings.

[2] The Bankruptcy Amendments and Federal Judgeship Act of 1984 was designed to eliminate this Court's constitutional concerns regarding the subject matter jurisdiction of bankruptcy courts. See, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

More importantly, when Congress enacted the 1978 Act and the 1984 Act, bringing virtually all litigation affecting the debtor's estate within the ambit of the traditional equitable forum of the bankruptcy court,[3] it was aware that this Court has held core bankruptcy proceedings to be equitable since the bankruptcy system was enacted by Congress. *See Barton v. Barbour*, 104 U.S. (14 Otto) 126, 134 (1881); *Bardes v. First National Bank of Hawarden*, 178 U.S. 524, 535 (1900); *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934); *Pepper v. Litton*, 308 U.S. 295, 304 (1939); and, *Katchen v. Landy*, 382 U.S. at 336. Congress, now having determined that actions to recover fraudulent conveyances are core bankruptcy proceedings requiring summary disposition by a bankruptcy judge, has expressed its intent that there is no statutory or constitutional right to a trial by jury in equitable proceedings.

Petitioners' argument that the Eleventh Circuit's analysis conflicts with this Court's seventh amendment analysis in *Tull v. United States*, 107 S.Ct. 1831 (1987); *Pernell v. Southall Realty*, 416 U.S. 363 (1974); and *Ross v. Bernhard*, 396 U.S. 531 (1970), and their suggestion that the Eleventh Circuit's analysis is at odds with *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), ignores the explicit restructuring of the bankruptcy system estab-

[3] Fraudulent convenance actions are now expressly included in the list of "core" proceedings within the jurisdiction of bankruptcy courts pursuant to the 1984 Act. See 28 U.S.C. 157(b)(2)(H) (1986).

lished in the 1978 and 1984 Acts. As stated by Justice White in *Katchen v. Landy:*

> Such a result [trial by jury] is not consistent with the equitable purposes of the Bankruptcy Act nor with the rule of *Beacon Theatres* and *Dairy Queen,* which is itself an equitable doctrine. In neither *Beacon Theatres* nor *Dairy Queen* was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury.

382 U.S. at 339 (citations omitted).

The restructuring of debtor-creditor relations is a pure bankruptcy matter. Where, as here, courts are adjudicating rights wholly of Congress' creation, such as the right to avoid "constructive" fraudulent conveyances under 11 U.S.C. § 548(a)(2) (1986). Congress has the authority to entrust the enforcement of such a statutory right to specialized courts of equity (bankruptcy courts) free from the strictures of the seventh amendment. *Curtis v. Loether,* 415 U.S. 189, 195 (1974). *See also Northern Pipeline,* 458 U.S. at 83, n.35. Congress' right to vest such matters within an equitable decision-maker, does not abridge the seventh amendment, does not conflict with the decisions of this Court and is consistent with *Katchen v. Landy* and the legislative actions of Congress in the 1978 and 1984 Acts.

II.

THERE IS NO CONFLICT WITHIN THE CIRCUIT COURTS AND THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF NUMEROUS DISTRICT AND BANKRUPTCY COURT DECISIONS

No conflict among or within the circuit courts exists on the issue of trial by jury in a fraudulent conveyance

action. Since the enactment of the 1978 and 1984 Acts, only one other circuit has considered the identical issue involving the "constructive" fraud provisions of § 548 of the Bankruptcy Code; and it is fully in accord with the Eleventh Circuit's conclusion in this case. *See Huffman v. Parkinson* (*In re Billy H. Harbour*), 840 F.2d 1165 (4th Cir. 1988). The Fourth Circuit, like the Eleventh Circuit, held that actions to recover fraudulent conveyances by bankruptcy trustees from noncreditors are core bankruptcy proceedings requiring summary disposition by a bankruptcy judge without a jury. 840 F.2d 1165, 1178. In reaching its conclusion, the Fourth Circuit observed: "[fraudulent conveyance actions] assume the historical equitable posture of all such bankruptcy proceedings" and concluded that "[t]he litigants involved in these actions have no seventh amendment right to trial by jury." 840 F.2d at 1178. *See also, Whitlock v. Hause,* 694 F.2d 861 (1st Cir. 1982) (holding that no seventh amendment right to trial by jury exists in fraudulent conveyance action) and *Senchal v. Carroll,* 394 F.2d 797 (10th Cir.) *cert. denied,* 393 U.S. 979 (1968) (decided under The Bankruptcy Act of 1898). That both the Eleventh Circuit and Fourth Circuit have squarely decided against a right to trial by jury in core proceedings, employing a consistent analysis in reaching their conclusion, should support this Court's decision to decline to accept certiorari jurisdiction in this case.[4]

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[4] The view that core proceedings such as fraudulent conveyance actions are *per se* equitable in light of *Katchen v. Landy,* and do not give rise to a constitutional right to a

(Continued on following page)

Petitioners' reliance on cases which distinguish legal from equitable actions in which a money judgment alone is sought (Petitioners' Brief at 13-14) injects an illusory distinction into this Court's analysis. These cases have little relevance here because the Trustee sought monetary relief as an adjunct to an equitable claim in a proceeding which is indisputably equitable in nature. *Curtis v. Loether*, 415 U.S. at 196. "[M]onetary relief may flow from an equitable claim without acquiring a legal character." *Towers v. Titus*, 5 B.R. 786, 794-95 (Bankr. N.D. Cal. 1979) (citations omitted).

In this fraudulent conveyance action the Trustee was not seeking "damages" or any "incidental or consequential damages"; if he was, under *Dairy Queen* and its progeny a legal issue to be tried by a jury may have been created. Rather, the Trustee here sought to avoid the transfer and to recover fungible property improperly transferred to the creditor. Regardless of the form of the remedy awarded by the court, the Trustee here performed the equitable function of restoring the *status quo* of the estate and of maximizing the recovery available to creditors—a "core" aspect of bankruptcy proceedings. The Eleventh Circuit's decision correctly recognized the importance of this distinction.

Further, the Eleventh Circuit's decision reflects the conclusion reached by the numerous other district courts

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(Continued from previous page)

jury trial, is also supported by the leading commentators in the area of bankruptcy. See 1 *Collier on Bankruptcy* ¶ 3.01[1][c][iv] at 3-63-3-64 (15th ed. 1987) and Norton and Lieb, *Jurisdiction and Procedure under the 1984 Bankruptcy Amendments*. Ann. Surv. Bankr. L. 53, 164 (1985).

and bankruptcy courts which have considered the issue of jury trials in bankruptcy proceedings after the enactment of the 1978 and 1984 Acts. *E.g., Lifetime Pools, Inc. v. Golds, (In the Matter of Hendon Pools of Michigan, Inc.)*, 57 B.R. 801 (E.D. Mich. 1987); *Anderson v. Duvoisin, (In re Southern Industrial Banking Corporation)*, 70 B.R. 196 (E.D. Tenn. 1986); *Jefferson National Bank v. I.A. Durbin, Inc., (In re I.A. Durbin, Inc.)*, 62 B.R. 139 (S.D. Fla. 1986); *Towers v. Titus*, 5 B.R. 786 (N.D. Cal. 1979); *Moratzka v. Wencl, (In re Wencl)*, 71 B.R. 879 (Bankr. D. Minn. 1987); *Transpro Corp. v. NTW Inc., (In re NTW Inc.)*, 69 B.R. 656 (Bankr. E.D. Va. 1987); *Reda, Inc. v. Harris Trust & Savings Bank, (In the Matter of Reda, Inc.)*, 60 B.R. 178 (Bankr. N.D. Ill. 1986); *Blackwell v. Wallace, (In re Wallace)*, 66 B.R. 834 (Bankr. E.D. Mo. 1986); *Stamps v. Sexton Bros. Tire Co., (In the Matter of Major Tire Company)*, 64 B.R. 305 (Bankr. N.D. Ga. 1986); *Mansker v. Campbell, (In re Mansker)*, 60 B.R. 803 (Bankr. D. Mass. 1986); *Stuhley v. Dunoco Development Corporation, (In re Dunoco Corporation)*, 56 B.R. 137 (Bankr. C.D. Cal. 1985); *Nordberg v. Bank of Credit and Commerce International, (In re Chase & Sanborn Corporation)*, 54 B.R. 43 (Bankr. S.D. Fla. 1985); *Nordberg v. Republic National Bank, (In re Chase & Sanborn Corporation)*, 55 B.R. 538 (Bankr. S.D. Fla. 1985); *Niedermayer v. Duncan, (In re Duncan)*, 51 B.R. 71 (Bankr. D. Md. 1985); *Energy Resources Co. v. Rosen, (In re Energy Resources Co.)*, 49 B.R. 278 (Bankr. D. Mass. 1985); *Leblance v. Rogers, (In re Rogers)*, 48 B.R. 683 (Bankr. E.D. Okla. 1985); *Pennells v. Barnes, (In re Best Pack Seafood, Inc.)*, 45 B.R. 194 (Bankr. D. Me. 1984); *Turner v. Wlodarski, (In re Minton Group, Inc.)*, 43 B.R. 705 (Bankr.

S.D.N.Y. 1984); *Country Junction, Inc. v. Levi Strauss & Co., (In re Country Junction, Inc.)*, 41 B.R. 425 (W.D. Tex. 1984); *McLouth Steel Corporation v. AJF, Inc., (In the Matter of McLouth Steel Corporation)*, 38 B.R. 316 (Bankr. E.D. Mich. 1984); *First International Services Corporation v. Apollo Sign Company, (In re First International Services Corporation)*, 37 B.R. 856 (Bankr. D. Conn. 1984); *Boroff v. Carriero, (In re Carriero)*, 21 B.R. 132 (Bankr. D. Mass. 1982); *In the Matter of Newman*, 14 B.R. 1014 (Bankr. S.D.N.Y. 1981); *Wood v. Otis, (In re Otis)*, 13 B.R. 279 (Bankr. M.D. Ga. 1981); and *Busey v. Fleming, (In re Fleming)*, 8 B.R. 746 (N.D. Ga. 1980).

A number of petitioners' cases (Petitioners' Brief at 13), pre-date the 1978 and 1984 Acts and therefore have marginal relevance. Moreover, all of the cases petitioners cite were decided before the well-reasoned and uniform decisions of the Fourth and Eleventh Circuits on this issue. Therefore, the superficial threat of disharmony among the lower bankruptcy courts no longer exists in view of the uniformity on this issue on the circuit court level.

III.

THE DECISION OF THE CIRCUIT COURT IS CONSISTENT WITH THE ANALYSIS OF THIS COURT IN DEFINING THE ROLE OF THE JURY IN BANKRUPTCY AND OTHER EQUITABLE PROCEEDINGS

Petitioners mischaracterize the principle relied upon by the Eleventh Circuit in *Katchen v. Landy*, 382 U.S. 323, by defining the principle as whether "the bankruptcy laws can convert a creditor's legal claim against a debtor's

estate into an equitable claim" (Petitioners' Brief at 14). Instead, the Eleventh Circuit relied on *Katchen* for the principle that Congress has the power to treat fraudulent transfers or preferences as core proceedings and to entrust such proceedings to a specialized court of equity.

Neither *Schoenthal* nor *Katchen*, as Petitioners suggest, "stand for the proposition that non-claimant defendants . . . sued by a trustee for damages, have a right to trial by jury in an otherwise equitable bankruptcy proceeding" (Petitioners' Brief at 15). To the contrary, both *Schoenthal* and *Katchen* support the Eleventh Circuit's view that both claimant as well as non-claimant parties defending a fraudulent conveyance action are within the scope of the equitable bankruptcy scheme established by Congress. Congress dramatically changed this scheme in the 1984 Act. It directed that bankruptcy courts may now *hear, determine*, and enter orders and judgments in all proceedings under Title 11, and all core proceedings arising under Title 11. 28 U.S.C. § 157(b)(1) (1986). Proceedings to "determine, avoid or recover fraudulent conveyances" by the express language of the statute, were intended to be within the jurisdiction of the bankruptcy courts. 28 U.S.C. § 157(b)(2)(H) (1986).

The Eleventh Circuit's reliance on *Katchen* is fully supported by this Court's long held view that matters, even when considered to be legal for seventh amendment purposes, become equitable when merged into bankruptcy proceedings:

> So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and

> in respect of their facts triable by jury, but, as belonging to the bankrupty proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods.

382 U.S. at 337 (*quoting Barton v. Barbour*, 104 U.S. (14 Otto) 126, 134).

While *Katchen* involved the voluntary interjection into the bankruptcy proceeding by the defendant through the filing of a claim, the distinction does not alter this Court's view that once a claim is brought within the bankruptcy court's traditional equitable power to marshall and administer the assets of the debtor's estate, through its chancery powers, it is free of seventh amendment considerations.

Nor does the Eleventh Circuit's decision conflict with this Court's decision in *Ross v. Bernhard*, 396 U.S. 531 (1970). This court's observation in *Ross v. Bernhard*, that in determining seventh amendment rights courts should examine issues rather than cases, is consistent with the Eleventh Circuit's analysis. The issues analyzed by the Eleventh Circuit in their broadest sense relate to the restructuring of the debtor-creditor relationship in bankruptcy. Moreover, in *Ross v. Bernhard* the issue did not involve, as here, a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury. Thus the Eleventh Circuit did not, as petitioners suggest, engage in a "magical conversion analysis" (see Petitioners' Brief at 15-16), but rather correctly concluded that Congress by designating such matters as core proceedings, brought them within the traditional equitable jurisprudence of bankruptcy courts.

IV.

CERTIORARI REVIEW IS UNNECESSARY TO EXAMINE THE STATUTORY SCHEME FOR BANKRUPTCY PROCEEDINGS ESTABLISHED BY CONGRESS WHERE NO JUDICIAL DISHARMONY IS PRESENT ON THE CIRCUIT COURT LEVEL

Congress, after studying for ten years the summary plenary distinction problem and the judicial quagmires resulting from this analysis under the 1898 Act, altered bankruptcy proceedings in the 1978 Act and the 1984 Act to correct these problems. The jurisdictional features of both Acts were designed primarily to eliminate the time and resources wasted in bankruptcy litigation. Congress sought to expedite the settlement of the debtor's estate and to avoid the prior time consuming process of determining whether disputes were to be resolved by summary or plenary proceedings. Affording every litigant in bankruptcy court a right to jury trial would dismember the statutory scheme of the Bankruptcy Act, *see Curtis v. Loether*, 415 U.S. 189, 194-95 (1974), and essentially undo the philosophy underlying the litigation of bankruptcy issues adopted by Congress.

The superficial appearance of disharmony which Petitioners have attempted to seize is only the consequence of the fact that lower bankruptcy courts did not have the benefit of the pronouncements of the Eleventh and Fourth Circuits, which have resolved the issue of the right to trial by jury.

The Eleventh Circuit's thoughtful decision in this case is faithful to this Court's guidance in *Katchen* and wholly consistent with the bankruptcy framework established by Congress. There is no reason whatsoever for the Court to review, let alone disturb, the decision which Petitioners have brought for review. This Court need not decide an issue which has been confronted and squarely resolved by the circuits. Accordingly, certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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REPLY

BRIEF

Supreme Court, U.S.
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Case No. 87-1716

In The

Supreme Court of the United States

October Term, 1987

GRANFINANCIERA, S.A., a Colombian corporation, and MEDEX, LTDA., a Latin American corporation,

Petitioners,

vs.

PAUL C. NORDBERG, Creditor Trustee for the Estate of Chase & Sanborn Corporation, f/k/a General Coffee Corporation,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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1. Pursuant to Rule 28.1, petitioners reassert and incorporate herein by reference the Rule 28.1 list set forth on page ii of their Petition.

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Case No. 87-1716

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October Term, 1987

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Petitioners,

vs.

PAUL C. NORDBERG, Creditor Trustee for the Estate of Chase & Sanborn Corporation, f/k/a General Coffee Corporation,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S "STATEMENT OF THE CASE"

The respondent's brief in opposition, at 3, is somewhat misleading in its discussion of the point in time, during the bankruptcy court proceedings, at which the petitioners orally demanded a jury trial. The evidentiary phase of the trial began on February 20, 1986. At page 47 of the transcript of February 20th, following oral argument on various procedural and evidentiary issues, the trustee offered, as his first evidence, the deposition of Edward Giovanelli. The defendants objected, and the court

reserved decision on whether to admit the deposition in evidence. Immediately thereafter, on pages 49-50 of the transcript, the defendants renewed their demand for a jury trial. Pages 49-50 of the February 20th transcript are reproduced in the appendix to the petition for certiorari at 33-35. Defendants' reassertion of their right to jury trial was thus timely made at the very beginning of the trial before any evidence had been received.

Respondent asserts, at 3, that his complaint alleged a cause of action under 11 U.S.C. § 548(a)(2), the constructive fraudulent transfer provisions of the Bankruptcy Code, but omits to mention that he also sought money damages for common law fraud, as codified in 11 U.S.C. § 548(a)(1) of the Code (App. 40-41). The trial judge found that the trustee had failed to prove common law fraud and dismissed the count with prejudice (App. 25).

RESPONDENT'S "REASONS FOR DENYING THE WRIT"

I

Respondent, at 7, attempts to distinguish *Katchen v. Landy*, 382 U.S. 323 (1966), on which he relies, from *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932), on which petitioners rely, on the grounds that "*Schoenthal* was decided under the now discarded bankruptcy scheme of bifurcated jurisdiction". Both *Katchen* and *Schoenthal*, however, were decided under the same section of essentially the same act governing preferential transfers—11 U.S.C. § 96. *Schoenthal* remains good law precisely

because it was revalidated by *Katchen*, under the same statutory scheme.

Respondent's argument, at 8, that petitioners' seventh amendment analysis ignores the fact that "a fraudulent conveyance action after 1978 is a statutory creation", misses the point of the petition. Certiorari is appropriate, petitioners argued, precisely because a fraudulent transfer action is *not* a creature of the 1978 and 1984 Bankruptcy Codes. Common law actions in trover and replevin to recover fraudulent transfers, as *Schoenthal* and numerous other cases recognize, have an ancient lineage that antedates the first English Bankruptcy Act of 1540 (34-5 Hen. VIII, c.4). 2 G.Glenn, Fraudulent Conveyances and Preferences, §§ 58-61e; 98 (Rev.Ed.1940). Congress, petitioners argued quite clearly in their petition, could not deprive them of their right to jury trial by relabelling these ancient legal causes of action "core" proceedings.

Respondent next argues, at 9, "that this Court has held core bankruptcy proceedings to be equitable since the bankruptcy system was enacted by Congress", citing *Katchen v. Landy*, 382 U.S. at 336; *Pepper v. Litton*, 308 U.S. 295 (1939); *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934); *Bardes v. Hawarden Bank*, 178 U.S. 524 (1900); and *Barton v. Barbour*, 104 U.S. 126 (1881). None of these cases support the principle for which they were cited. *Katchen*, *Pepper* and *Barton* address the unrelated issue of summary jurisdiction over claims *against* the debtor's estate or the trustee. *Local Loan Co.* discusses the equitable jurisdiction of a bankruptcy court to enjoin state court proceedings. *Bardes* simply foreshadowed what *Schoenthal* later confirmed—that a trustee's action to recover a fraudulent transfer was, traditionally, "not

strictly or properly part of the proceedings in bankruptcy". 178 U.S. at 538. None of these cases, of course, discusses "core" proceedings—a post-1978 concept—or even remotely intimates that a trustee's suit for damages against a non-claimant is an equitable proceeding.

II

Huffman v. Perkinson (In re Harbour), 840 F.2d 1165 (4th Cir. 1988), which appared in West's advance sheets two days after the petition herein was mailed, is in accord with the opinion of the Eleventh Circuit. However, Circuit Judge Widener dissented in *Huffman* on precisely the grounds asserted in the petition for certiorari in this case. He correctly discerned that "*Schoenthal* is a precise ruling of the Supreme Court on the question at hand", 840 F.2d at 1182, and concluded, after analyzing each of the Supreme Court decisions petitioners rely on herein, that the defendants were entitled to a jury trial on the trustee's fraudulent transfer and fraudulent preference action for damages.

Whitlock v. Hause, 694 F.2d 861 (1st Cir. 1982), and *Senchal v. Carroll*, 394 F.2d 797 (10th Cir. 1968), *cert. denied*, 393 U.S. 979 (1968), cited by the respondent, at 11, for the proposition that no seventh amendment right to trial by jury exists in a fraudulent conveyance action, do not support that assertion. *Whitlock* involves an action to set aside the transfer of an interest in real property. Damages were alternatively sought only if the reconveyance could not be effected. Far from announcing the rule for which it was cited by respondent, *Whitlock*, in dicta, distinguishes its facts from those in the present case:

> [W]hen a plaintiff combines in a single proceeding both a legal claim for damages and an equitable request that the court set aside a fraudulent conveyance, the seventh amendment preserves the parties' right to trial by jury on the underlying legal claim.

Id. at 864, This dicta in *Whitlock* clearly conflicts with the holding below, and in *Huffman*.

Senchal involved a complaint, the court was careful to note, in which "no damages were sought nor money judgment prayed for". 394 F.2d at 798. The case involved a complex accounting and the reconveyance of real and personal property. Monies were also ordered to be reconveyed; but part of the monies had previously been ordered reconveyed and the rest consisted of a fund already in custodia legis. The respondent's tacit recognition of the bright line drawn in the vast majority of cases, including *Whitlock* and *Senchal*, between a complaint for money damages, which does require a jury trial, and a complaint for the reconveyance of property, which does not, is reflected in his strained description of the money damages he sought as "fungible property". Brief at 12.

The respondent's related argument, that the trustee was performing an equitable function by restoring these monies to the estate, proves too much. Every legal action commenced by a trustee, by definition, must be for the purpose of "maximizing the recovery available to creditors". If the quoted factor was to determine whether a cause of action were legal or equitable, every cause of action by a trustee, core and non-core, state and federal, statutory and non-statutory, would be equitable—which is plainly not the case.

The respondent's list, at 13-14, of twenty-five cases which purport to accord with the decision of the Eleventh Circuit, contains numerous factually distinguishable entries. In six of the twenty-five cases, the trustee sought only equitable relief. *Moratzka v. Wencl (In re Wencl)*, 71 B.R.879 (Bankr.D.Minn.1987) (Avoidance of transfers of real and personal property); *Blackwell v. Wallace (In re Wallace)*, 66 B.R.834 (Bankr.E.D.Mo.1986) (Avoidance of transfer of real property and turnover of retirement and stock ownership plan interests); *Energy Resources Co. v. Rosen (In re Energy Resources Co.)*, 49 B.R. 278 (Bankr.D.Mass.1985) (Cancellation of contract, return of stock, and avoidance of liens, through injunction and turnover orders); *Turner v. Wlodarski (In re Minton Group, Inc.)*, 43 B.R.705 (Bankr.S.D.N.Y.1984) (Reconveyance of property); *Wood v. Otis (In re Otis)*, 13 B.R.279 (Bankr. N.D.Ga.1981) (Reconveyance of real property and accounting); *Towers v. Titus*, 5 B.R.786 (N.D.Cal.1979) (Avoidance of transfers of real property, accounting, injunction, constructive trust). In four other cases out of the twenty-five, money damages were sought but only as an express alternative to the primary relief requested which was the reconveyance of property. *Stamps v. Sexton Bros. Tire Co. (In re Major Tire Co.)*, 64 B.R.305 (N.D.Ga.1986); *Stuhley v. Dunoco Development Corp. (In re Dunoco Corp.)*, 56 B.R.137 (Bankr.C.D.Cal.1985); *Lerblance v. Rogers (In re Rogers & Sons, Inc.)*, 48 B.R.683 (Bankr.E.D.Okla.1985); *Busey v. Fleming (In re Fleming)*, 8 B.R. 746 (N.D.Ga.1980). Of the remaining fifteen cases, five involved suits against claimants or defendants who had otherwise submitted themselves to the bankruptcy court's summary jurisdiction. *Transpro Corp. v.*

NTW, Inc. (In re NTW, Inc.), 69 B.R.656 (Bankr.E.D.Va. 1987); *Jefferson National Bank v. I.A. Durbin, Inc. (In re I.A. Durbin, Inc.)*, 62 B.R.139 (S.D.Fla.1986); *Mansker v. Campbell (In re Mansker)*, 60 B.R.803 (Bankr.D.Mass. 1986); *McLouth Steel Corp. v. AJF, Inc. (In re McLouth Steel Corp.)*, 38 B.R.316 (Bankr.E.D.Mich. 1984); *First International Services Corp. v. Apollo Sign Co. (In re First International Services Corp.)*, 37 B.R.856 (Bankr. D.Conn.1984).

Thus, fifteen of the respondent's twenty-five cases either do not support the principle for which they were cited, or recognize—tacitly or expressly—a distinction between equitable and legal proceedings based upon whether the trustee sought damages or an equitable remedy. While the remaining ten cases support, in varying degrees, the respondent's position they, along with the decisions of the Eleventh and Fourth Circuits, still represent a distinct minority of the cases which have considered the jury trial issue.

Respondent tries to similarly pare down the petitioners' list of contra cases by arguing, at 14, that some of the petitioners' cases pre-date the 1978 and 1984 bankruptcy acts. The conflict petitioners assert, however, is primarily over the Eleventh Circuit's interpretation of the seventh amendment. Every seventh amendment analysis must be conducted in an historical context. It is highly relevant in determining whether conflict exists to know that the vast majority of courts, including this Court in *Schoenthal* and numerous circuit courts, some of which are noted at 13 in the petition, have found that a bankruptcy trustee's action to recover damages for a prefer-

ential transfer or a fraudulent transfer is an historically legal cause of action.

IV

The conceptual and numerical "disharmony" that exists between the Eleventh and Fourth Circuit's position, and that of the majority of courts in the federal system, is far more than "superficial" to use the respondent's words. If any harmony is to be deemed superficial it is the agreement of one three-judge panel in the Eleventh Circuit, with two judges in the Fourth Circuit.

Notwithstanding the agreement of five circuit court judges on the issue in this case, and this Court's past consideration of circuit court conflict as one basis for certiorari jurisdiction on seventh amendment questions, *e.g.*, *Tull v. United States*, 107 S. Ct. 1831, 1835 (1987), this Court has weighed considerations other than circuit court conflict heavily in deciding whether to grant certiorari in seventh amendment cases. *See Pernell v. Southall Realty*, 416 U.S.363,365 (1974) (Certiorari granted "[b]ecause of the novel nature of the Seventh Amendment question. . . . "); *Curtis v. Loether* 415 U.S.189,191, and n.2 (1974) (Certiorari granted because of the importance of the question to the "administration and enforcement" of a statutory scheme and because of "the diversity of views in the [district courts] on the question"); *Dairy Queen, Inc. v. Wood*, 369 U.S.469,470 (1962)(Certiorari granted "because the action of the Court of Appeals seemed inconsistent with protections already clearly recognized for the important constitutional right to trial by jury in our previous decisions"); *Beacon Theatres v. Westover*, 359 U.S. 500,501 (1958)(Certiorari granted "because 'Maintenance

of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care'. *Dimick v. Schiedt*, 293 U.S. 474-476"). The foregoing factors in favor of certiorari are all present in this case.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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JOINT

APPENDIX

(4)

No. 87-1716

In The

Supreme Court of the United States

October Term, 1987

GRANFINANCIERA, S.A., a Colombian corporation, and MEDEX, LTDA., a Latin American corporation,

Petitioners,

vs.

PAUL C. NORDBERG, Creditor Trustee for the Estate of Chase & Sanborn Corporation, f/k/a General Coffee Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 18, 1988
CERTIORARI GRANTED JUNE 13, 1988

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STATEMENT OF DOCUMENTS OMITTED

The following opinions, decisions, judgments, orders and pleadings have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the United States Court of Appeals for the Eleventh Circuit, dated January 19, 1988 ..... Pet.App.1

Order of the United States District Court for the Southern District of Florida, Affirming the Decision of the Bankruptcy Court, dated August 14, 1988 ..... Pet.App.18

Memorandum Decision of the United States Bankruptcy Court for the Southern District of Florida, dated April 16, 1986 ..... Pet.App.24

Judgment of the United States Bankruptcy Court for the Southern District of Florida, dated April 16, 1986 ..... Pet.App.31

Decision of Bankruptcy Judge Thomas C. Britton, denying defendants' request for jury trial, on February 20, 1986 [Transcript pages 1,49,50] Pet.App.33

Complaint of Paul C. Nordberg against Granfinanciera, S.A., and Medex, Ltda., filed May 17, 1985 ..... Pet.App.36

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

5/18/83	Trustee files petition for reorganization.
5/17/85	Trustee files complaint for fraudulent transfer in District Court.
7/12/85	Order of District Court referring proceedings to Bankruptcy Court.
1/29/86	Order setting trial for February 20, 1986.
2/19/86	Defendants file Answer and request for jury trial.
2/20/86	Trial begins.
3/20/86	Trial continues.
4/10/86	Trial ends.
4/16/86	Memorandum Decision, and Judgment in Trustee's favor.
8/14/86	Order of District Court affirming judgment of Bankruptcy Court.
1/19/88	Opinion of United States Court of Appeals affirming order of District Court.

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF FLORIDA

In re:

CHASE & SANBORN CORP. f/k/a GENERAL COFFEE CORP.

CASE NO. 83-00889-BKC-TCB CHAPTER 11

ADV. NO. 86-0043-BCK-TCB-A

PAUL C. NORDBERG, as Creditor Trustee for the Estate of the Debtor, CHASE & SANBORN CORP. f/k/a GENERAL COFFEE CORP.,

Plaintiff,

vs.

GRANFINANCIERA, S.A., a Colombian corporation, and MEDEX, LTDA., a Latin American corporation,

Defendants.

---/

ANSWER TO PLAINTIFF'S COMPLAINT

Defendants, GRANFINANCIERA, S.A., and MEDEX, LTDA., by and through undersigned counsel, hereby file pursuant to Court Order their Answer to Plaintiff's Complaint which Complaint was originally filed under United States District Court for the Southern District of

Florida case no 85-1723-CIV-EATON and would show as follows:

1. Defendants deny the allegations contained in paragraph 1 of Plaintiff's Complaint and demand strict proof thereof.

2. Defendants are without knowledge as to the allegations contained in paragraph 2 of Plaintiff's Complaint and on that basis deny same and demand strict proof thereof.

3. Defendants are without knowledge as to the allegations contained in paragraph 3 of Plaintiff's Complaint and on that basis deny same and demand strict proof thereof.

4. Defendants deny the allegations contained in paragraph 4 of Plaintiff's Complaint and demand strict proof thereof.

5. Defendants are without knowledge as to the allegations contained in paragraph 5 of Plaintiff's Complaint and on that basis deny same and demand strict proof thereof.

6. Defendants are without knowledge as to the allegations contained in paragraph 6 of Plaintiff's Complaint and on that basis deny same and demand strict proof thereof.

7. Defendants are without knowledge as to the allegations contained in paragraph 7 of Plaintiff's Complaint and on that basis deny same and demand strict proof thereof.

8. Defendants are without knowledge as to the allegations contained in paragraph 8 of Plaintiff's Complaint and on that basis deny same and demand strict proof thereof.

9. Defendants are without knowledge as to the allegations contained in paragraph 9 of Plaintiff's Complaint and on that basis deny same and demand strict proof thereof.

10. Defendants deny the allegations contained in paragraph 10 of Plaintiff's Complaint and demand strict proof thereof.

11. Defendants deny the allegations contained in paragraph 11 of Plaintiff's Complaint and demand strict proof thereof.

COUNT I

12. Paragraph 12 of Plaintiff's Complaint is a reallegation of previous paragraphs of Plaintiff's Complaint and accordingly Defendants reallege and restate their responses to said preceding paragraphs.

13. Defendants deny the allegations contained in paragraphs 13 through 18 of Plaintiff's Complaint and demand strict proof thereof.

COUNT II

14. Paragraph 19 of Plaintiff's Complaint is a reallegation of previous paragraphs of Plaintiff's Complaint

and accordingly Defendants reallege and restate their responses to said preceding paragraphs.

15. Defendants deny the allegations contained in paragraphs 20 through 21 of Plaintiff's Complaint and demand strict proof thereof.

AFFIRMATIVE DEFENSES

Defendants, by and through undersigned counsel, hereby file the following Affirmative Defenses to Plaintiff's Complaint.

1. *Lack of Benefit.* At all times material to these transactions, Defendants acted as a mere conduit for the transfer of funds by General Coffee Corp. to other entities, and as such, Defendants never received any benefit from this transaction and are therefore not liable under Section 548 of the Bankruptcy Code.

2. *Estoppel.* By its actions in this cause and by its failure to properly and timely prosecute this cause, Plaintiff is estopped from prosecuting this action against Defendants.

3. *Laches.* Plaintiff is guilty of laches in this proceeding and therefore cannot prosecute this cause against Defendants.

4. *Waiver.* By its actions in failing to timely pursue this action, Plaintiff has waived its rights to prosecute this cause.

5. *Lack of Jurisdiction Over the Subject Matter.* Due in part to the fact that determination of this action requires determination of the Foreign Sovereign Immuni-

ties Act, this Court lacks subject matter jurisdiction over this action.

6. *Lack of Jurisdiction over the Defendants.* This Court lacks either in personam or in rem jurisdiction over the Defendants and therefore this action should be dismissed. Plaintiff has not alleged in his Complaint sufficient minimum contacts of Defendants with this jurisdiction which would allow this Court to exercise in personam jurisdiction over said Defendants.

7. *Improper Venue.* Venue of this cause is improper and hence this action should be dismissed.

8. *Insufficiency of Process.* Due in part to insufficiency of process, this Court lacks in personam jurisdiction over the Defendants.

9. *Insufficiency of Services of Process.* Due in part to insufficiency of service of process, this Court lacks in personam jurisdiction over the Defendants.

10. *Failure to State a Cause of Action.* The Complaint fails to state a claim upon which relief can be granted and hence must be dismissed.

11. *Failure to Join Indispensable Parties.* Plaintiff's Complaint fails to join all indispensable parties to this action. Defendants were mere conduits and Plaintiff has negligently and improperly sued Defendants when in fact its relief lies against the entity who actually received the benefit of this transfer and not Defendants who were mere good faith bona fide conduits in the alleged transactions.

12. *11 U.S.C. 548(c).* Defendants come within the exception contained in 11 U.S.C. 548(c) and therefore

Plaintiff cannot recover against Defendants and Plaintiff's Complaint must be dismissed.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendants request that this Court dismiss the instant Complaint with prejudice, award fees and costs of defending this improper action to Defendants, and take all other action deemed just and proper. Further, Defendants demand trial by jury on all issues so triable.

DATED this 19th day of February, 1986.

EZELL, MENENDEZ & PATTERSON
Attorneys for Defendants

(Address, telephone number and signature omitted in printing)

(Certificate of Service Omitted in printing)

PETITIONER'S

BRIEF

FILED
AUG 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1716

In The

Supreme Court of the United States

October Term, 1987

GRANFINANCIERA, S.A., a Colombian corporation, and MEDEX, LTDA., a Latin American corporation,

Petitioners,

vs.

PAUL C. NORDBERG, Creditor Trustee for the Estate of Chase & Sanborn Corporation, f/k/a General Coffee Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED*

Chase & Sanborn filed a Chapter 11 petition in bankruptcy. Trustee Nordberg sued petitioners to recover allegedly fraudulent cash transfers made to petitioners by the debtor before bankruptcy. The relief sought by the trustee, and awarded by the court, was a judgment for the amount of the transfers. Petitioners requested but were denied a trial by jury.

The questions presented are:

1. Did petitioners have a Seventh Amendment right to a jury trial of the fraudulent transfer action where the only relief the trustee requested was money damages?

2. Could Congress' designation of the trustee's fraudulent transfer action as a bankruptcy "core" proceeding, under 28 U.S.C. § 157(b)(2) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, abrogate petitioners' Seventh Amendment right to a jury trial of that otherwise traditionally legal cause of action?

3. Does the repeal of 28 U.S.C. § 1480, and the enactment of 28 U.S.C. § 1411, by the Bankruptcy Amendments and Federal Judgeship Act of 1984, providing for jury trials in certain bankruptcy matters, abrogate the petitioners' Seventh Amendment right to a jury trial?

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* Petitioners reallege and incorporate by reference the Rule 28.1 List appearing on p. ii of their petition for certiorari.

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STATEMENT OF THE CASE

Respondent Paul Nordberg is the trustee of Chase & Sanborn Corporation, a privately owned coffee company that entered Chapter 11 reorganization proceedings on May 18, 1983, after its principal officer, Alberto Duque (who is presently serving a fifteen-year federal prison term for bank fraud), diverted millions of dollars from the company to various persons, including a number of Colombian banks. Respondent has instituted more than 70 lawsuits against the recipients of those fraudulent transfers, including this lawsuit against petitioners Granfinanciera, S.A., and Medex, Ltda., seeking to restore the transfers to the estate pursuant to 11 U.S.C. §§ 548 (a)(1) & (2), and 550(a). The district court overseeing the bankruptcy case delegated trial of the fraudulent transfer claims to a bankruptcy judge, pursuant to 28 U.S.C. § 157. Following a bench trial, the bankruptcy judge ruled for respondent and ordered return of $1.5 million by Granfinanciera, and of $180,000 by Medex.

Petitioners seek to upset that judgment on the theory that they have a right to jury trial on the fraudulent transfer claims, either because federal statutes that they concede are no longer in effect somehow confer such a right (*see* Part I, *infra*), or because the Seventh Amendment guarantees that right of its own force (*see* Parts II through V, *infra*). Petitioners claim that this is so even though Congress entrusted resolution of these fraudulent transfer claims to the specialized bankruptcy tribunal in charge of the company's reorganization. Their arguments rest upon a confused account of the past and present structure of bankruptcy jurisdiction, a brief overview of which is necessary to frame the issues before the proceedings in this case are fully described.

A. Overview of Bankruptcy Jurisdiction

In the original Bankruptcy Act of 1800, Congress vested jurisdiction over all matters relating to bankruptcy in the Article

III district courts.[1] In the Bankruptcy Acts of 1841, 1867 and 1898 (and its various amendments, most notably the Chandler Act of 1938[2]), Congress divided that jurisdiction. It constituted the district courts as courts of bankruptcy, specifying that they had "jurisdiction in all matters and proceedings in bankruptcy," and that this "jurisdiction [is] to be exercised summarily, in the nature of summary proceedings in equity."[3] Within this bankruptcy jurisdiction, often called "summary" jurisdiction, Congress generally allowed the adjudication of all matters related to bankruptcy, including but not limited to claims made by creditors and disputes between the debtor and the trustee. But excluded from this bankruptcy jurisdiction were certain kinds of lawsuits brought by a trustee to recover assets for the benefit of the estate, notably actions to recover money or other property fraudulently or preferentially transferred by the debtor to others.[4] Congress required such lawsuits, often referred to as "plenary" suits, to be brought outside the bankruptcy jurisdiction, either in an ordinary federal district court (where Seventh Amendment considerations would apply), or in a state court (where, of course, the Seventh Amendment would have no application[5]).

Under this 19th-century structure, as this Court noted in *Barton* v. *Barbour*, 104 U.S. 126, 133-34 (1881), the Seventh

[1] *See* Bankruptcy Act of 1800, § 2, 2 Stat. 19, 21-22 (1800), repealed, 2 Stat. 248 (1803).

[2] The Chandler Act, Pub. L. No.75-696, 52 Stat. 840 (1938), combined and generalized prior laws relating to corporate reorganizations, adding several chapters to the 1898 Act providing for rehabilitation of debtors as an alternative to simple liquidation of assets. Those provisions now appear as Chapter 11 of the current bankruptcy statute, 11 U.S.C. §§ 1101 *et seq*.

[3] Bankruptcy Act of 1841, § 6, 5 Stat. 440, 445-46 (1841), repealed, 5 Stat. 614 (1843). *See also* Bankruptcy Act of 1867, § 1, 14 Stat. 517, 517-18 (1867), repealed, 20 Stat. 99 (1878); Bankruptcy Act of 1898, §§ 1(7), 1(8), 2, 30 Stat. 544, 544-46 (1898).

[4] *See* 1841 Act, § 8, 5 Stat. 446-47; 1867 Act, § 2, 14 Stat. 518; 1898 Act, §§ 23(a), 23(b), 30 Stat. 552, discussed in *Bardes* v. *Hawarden Bank*, 178 U.S. 524, 531-38 (1900).

[5] *See, e.g., Alexander* v. *Virginia*, 413 U.S. 836, 836-37 (1973) (per curiam); *Mayes* v. *Ellis*, 409 U.S. 943 (1972), *aff'g on appeal Melancon* v. *McKeithen*, 345 F. Supp. 1025, 1027, 1035-45, 1048 (E.D. La. 1972) (Wisdom, J., for three-judge court).

Amendment did not apply at all within the bankruptcy jurisdiction. But Congress granted certain statutory, as opposed to Seventh Amendment, jury rights even in the bankruptcy courts.[6] And, under the Seventh Amendment, litigants in "plenary" suits brought in federal court *outside* the bankruptcy jurisdiction could qualify for a jury trial whenever the claim was properly characterized as a "legal" one. *See, e.g., Schoenthal* v. *Irving Trust Co.*, 287 U.S. 92, 94-95 (1932). When a claim fell within the bankruptcy jurisdiction, and when no *statutory* jury right was provided, no party could claim a jury trial. That principle was reaffirmed most prominently in *Katchen* v. *Landy*, 382 U.S. 323, 336-39 (1966), where this Court noted that "the proceedings of bankruptcy courts are inherently proceedings in equity"; that " 'the right of trial by jury . . . does not extend to cases of equity jurisdiction' "; and that "legal" cases which would be jury-triable in an ordinary federal court, by " 'belonging to the bankruptcy proceedings . . . become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control.' " *Id.* at 336-37 (quoting *Barton*, 104 U.S. at 133-34).

Twelve years after this Court's decision in *Katchen*, Congress repealed the 1898 Act and passed the Bankruptcy Reform Act of 1978 ("1978 Act").[7] Concerned about the wasteful litigation and excessive delays that had been spawned under previous statutes by the need to determine whether the trustee could properly include a suit within the bankruptcy jurisdiction, and concerned with the need to subject bankruptcy trustees and the process to centralized and continuous supervision, Congress expanded bankruptcy jurisdiction, as it had in 1800, to cover all matters related to bankruptcy.[8] In 28 U.S.C.

[6] Section 19(a) of the 1898 Act retained the right, which had been recognized in all the previous statutes, of those subject to an involuntary bankruptcy proceeding to a jury trial on whether that person was insolvent, or had committed an "act of bankruptcy." 30 Stat. 551.

[7] Pub. L. No. 95-598, 92 Stat. 2549, codified at 11 U.S.C. §§ 101 *et seq*.

[8] *See* S. Rep. No. 989, 95th Cong., 2d Sess. 17 (1978) (noting that "[a] major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction"); H. Rep. No. 595, 95th Cong., 1st Sess. 445

§ 1471(a), Congress vested in the district courts "original and exclusive jurisdiction of all cases under title 11" — that is, jurisdiction over bankruptcy petitions. And Congress provided, without exception, that *all* matters related to those petitions could be decided by special bankruptcy courts, constituted under Article I as "adjunct[s] to the district court," 28 U.S.C. § 151(a), whose jurisdiction would extend to "all civil proceedings arising under title 11 or arising in or related to cases under title 11." *Id.* § 1471(b). At the same time, Congress decided that the jury rights which had been recognized in "plenary" suits under the 1898 Act should be statutorily preserved so as to survive the inclusion of such suits in the newly expanded bankruptcy jurisdiction. Thus, Congress enacted a savings clause, *id.* § 1480(a), expressly stating that the 1978 expansion of bankruptcy jurisdiction was not to "affect any right to trial by jury . . . that is provided by any statute in effect" on the day before the 1978 Act went into effect.[9]

(1977) (noting that "[a]ctions that formerly had to be tried in State court or in Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy courts").

[9] Although it could have been said that jury rights in plenary actions were provided not by any "statute" but by this Court's application of the Seventh Amendment to the previous statutory *structure*, the legislative history makes clear that § 1480 was meant to replicate, on a statutory basis, the pattern of jury rights that had earlier been found under the Seventh Amendment. The House report was most specific, stating: "Proposed section 1480 requires that the right of jury trial be preserved as it is under the present law. Bankruptcy courts will be required to hold jury trials to adjudicate what are under present law called plenary suits, that is, suits that are brought in State or Federal courts other than the bankruptcy courts." H.R. Rep. 595, 95th Cong., 1st Sess. 12 (1977). *See also id.* at 448 (noting that § 1480 "continues any current right of litigants in bankruptcy cases, and cases related to bankruptcy cases, such as plenary actions, to a jury trial"). Moreover, the "shall not affect" language was the locution Congress used to preserve jury trials statutorily in 1970, when it slightly expanded bankruptcy jurisdiction to include some formerly "plenary" suits. *See* Pub. L. No. 91-467, 84 Stat. 992 (1970), adding § 17(c) to the 1898 Act, preserving jury trials, on a statutory basis, for certain issues concerning the dischargeability of particular debts, which had previously been determined in non-bankruptcy forums (the reservation stated that "[n]othing in [this amendment] shall be deemed to affect the right of any party, upon timely demand, to a trial by jury, where such right exists" (§ 17(c)(3)); *see Matter of Merrill*, 594 F.2d 1064, 1068 (5th Cir. 1979). All statutory rights enjoyed under the 1898 Act were preserved by § 1480 of the 1978 Act except for those referred to in § 1480(b), which stated that issues concerning whether an involuntary bankruptcy case was properly brought, under 11 U.S.C. § 303, could be tried without a jury, contrary to § 19(a) of the 1898 Act, *see supra* note 6.

Shortly thereafter, in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court struck down under Article III a bankruptcy judge's final determination of a state-law contract suit brought by the trustee of a company in a Chapter 11 reorganization proceeding. That suit had been filed against a third party, alleging pre-petition wrongs wholly unrelated to the structure and operation of Chapter 11. Principal objections in the Court's plurality opinion included the requirement of 28 U.S.C. § 1471(c) that bankruptcy judges, whose terms of appointment were inconsistent with those of Article III judges, *see Northern Pipeline*, 458 U.S. at 60-61, "shall exercise *all* of the jurisdiction conferred by this section on the district courts" (emphasis added), with only normal appellate review in the district courts, and the fact that those bankruptcy judges, despite their Article I character, exercised almost the full range of Article III powers including the power to conduct jury trials, *id.* at 84-86.

Two years later, Congress responded to *Northern Pipeline* in Title I of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("1984 Amendments").[10] That statute repealed all of the 1978 Act's jurisdictional provisions, including § 1480's statutory preservation of jury trials.[11] In their place, Congress

[10] Pub. L. No. 98-353, 98 Stat. 333 (1984), codified in 28 U.S.C.

[11] As petitioners correctly concede (Petitioners' Brief ("PB") 32-33 & n.7), §§ 113 and 114 of the 1984 Amendments, 98 Stat. 343, repealed the 1978 jurisdictional provisions, effective July 10, 1984, for all cases then pending and all future cases, notwithstanding technical inconsistencies contained in § 121 of the 1984 Amendments, which was designed to bring the non-repealed provisions of the 1978 Act into conformance with the new statutory structure. *See In re Carter*, 759 F.2d 763, 764-66 (9th Cir. 1985). The current lack of any statutory jury right relevant to the fraudulent transfer claims is made clear by the comment of the Bankruptcy Rules Advisory Committee on the abrogation of former Bankruptcy Rule 9015, part of the bankruptcy amendments which this Court submitted to Congress on March 30, 1987, and which became effective on August 1, 1987. Rule 9015, which had been drafted before the *Northern Pipeline* decision, provided procedures for jury trials before bankruptcy judges. The Advisory Committee commented that Rule 9015 should be abrogated because 28 U.S.C. § 1480, the only provision for jury trials before bankruptcy judges, had been repealed, and that its replacement, 28 U.S.C. § 1411, "affords a jury trial only for personal injury or wrongful death claims, which 28 U.S.C. § 157(b)(5) requires be tried in the district court." The Committee explained that Rule 9015 should be abrogated, quite apart from being unnecessary, because it had been cited by courts and commentators "as

enacted new provisions to apply to all cases then pending as well as all future cases.[12] Congress left the scope of bankruptcy jurisdiction intact, *see* 28 U.S.C. §§ 1334(a) & (b), but changed its distribution. Under the new 28 U.S.C. § 157, most bankruptcy matters, defined as "core" proceedings — explicitly including the fraudulent transfer claims in this case — could continue to be heard and determined by Article I bankruptcy judges whenever the Article III district courts delegated such matters to those judges. Other matters could be delegated to the bankruptcy judges as well, but such non-core matters would be subject to *de novo* review by the district courts, absent consent of the parties.[13]

The new jurisdictional structure repealed § 1480, but Congress notably continued its practice of treating jury trials in

conferring a right to jury trial" on matters not covered by § 1411, contrary to the mandate of 28 U.S.C. § 2075 that the rules not have a substantive effect. *See* Advisory Committee Note — 1987 Amendment to Bankruptcy Rule 9015, *reprinted in* 2 *Collier Pamphlet Edition Bankruptcy Rules* 254 (1988) (ed. L. King).

[12] Section 122(a) provided that the jurisdictional provisions of the 1984 Amendments "shall take effect on the date of enactment of this Act [July 10, 1984]." That the new jurisdictional provisions generally became effective immediately for all cases then pending (such as the underlying petition in this case, filed on May 18, 1983) and for all proceedings filed under them (such as the fraudulent transfer claims in this case, filed on May 17, 1985) is made clear by the language in § 122(b) of the 1984 Amendments, setting out the two provisions that would apply only to future cases and proceedings: "[28 U.S.C. §§ 1334(c)(2) and 1411(a)], as added by this Act, shall not apply with respect to cases under title 11 . . . that are [now] pending . . ., or to proceedings arising in or related to such cases." *See also* PB 32-33 n.7; *In re Harbour*, 840 F.2d 1165, 1167 n.3 (4th Cir. 1988).

[13] Section 157 thus addressed *Northern Pipeline's* objection that, under the old 28 U.S.C. § 1471(c), bankruptcy judges would exercise *all* bankruptcy jurisdiction. Section 157(a) provided that district courts could refer "any or all" bankruptcy claims to the bankruptcy judges. Section 157(b) provided that bankruptcy judges could "hear and determine" (provided the reference was not withdrawn prior to decision), subject only to normal appellate review under § 158, "core" bankruptcy proceedings — proceedings which Congress assumed could be delegated under *Northern Pipeline*, from which the term was borrowed. Section 157(b) expressly enumerated fifteen types of core proceedings, including proceedings brought by trustees to recover fraudulent transfers (§ 157(b)(2)(H)). Section 157(c)(1) provided that "otherwise related," or non-core proceedings could be initially heard by bankruptcy judges, who would propose findings of fact, with *de novo* review in the district courts, and § 157(c)(2) provided that these proceedings could be finally determined by the bankruptcy judges with the consent of the parties.

bankruptcy proceedings as a matter of legislative grant. Thus, a statutory right to jury trial in the district court was afforded individuals asserting personal injury and wrongful death claims against the debtor. *See* 28 U.S.C. § 1411(a) (jury trial right); § 157(b)(5) (assignment to district courts). Such "tort creditors" would otherwise have been relegated with all other claimants to core proceedings in the bankruptcy courts. 11 U.S.C. § 101(4); 28 U.S.C. § 157(b)(2)(B); *see, e.g., In re Johns-Manville Corp.*, 36 B.R. 743 (Bkrtcy.S.D.N.Y. 1984). This jury trial right was, however, also statutorily limited in 1984: it did not apply in district court proceedings conducted to determine the propriety of a creditor-initiated "involuntary" bankruptcy. 28 U.S.C. § 1411(b); *see also* 11 U.S.C. § 303.

B. Proceedings Below

Respondent, the trustee in the bankruptcy court below, filed claims against petitioners on May 17, 1985, pursuant to 11 U.S.C. §§ 548(a)(1) & (2), and 550(a), to avoid fraudulent transfers of Chase & Sanborn Corporation assets that the trustee alleged had been made by Alberto Duque, to pay personal and family expenses in Colombia, in the months before the corporation entered Chapter 11 proceedings. (*See* Complaint, Appendix to Petition for Certiorari ("CPA") 36-41.) The complaint alleged that petitioner Medex had received two cashier's checks totaling $180,000, and that petitioner Granfinanciera had received a wire transfer in the amount of $1.5 million. Petitioners were properly served in Bogota, Colombia, on December 26, 1985. The district court found it appropriate to refer the fraudulent transfer claims for decision by the bankruptcy judge.[14]

[14] Respondent initially filed those claims in district court, out of an abundance of caution on the issue of whether they could be determined by a bankruptcy judge in the wake of this Court's decision in *Northern Pipeline*. (*See* Complaint ¶ 1 (CPA 37)). Petitioners expressly denied the existence of any such problem (¶ 1, Joint Appendix ("JA") 3), and petitioners did not appeal to the Eleventh Circuit the district court's denial of their belated challenge to having the claims tried in a tribunal presided over by a non-Article III judge. Indeed, only after this Court had granted certiorari on three other questions did petitioners even hint that they might raise Article III objections, grounded on *Northern Pipeline*,

On January 10, 1986, the Government of Colombia nationalized petitioner Granfinanciera, which thereby became an instrumentality of a foreign sovereign (CPA 3). Thereafter, both petitioners requested a jury trial on the fraudulent transfer claims, which the bankruptcy judge denied. Following the bench trial, the bankruptcy judge found for respondent and entered judgment on each fraudulent transfer claim. The district court affirmed that judgment (CPA 18-23). On appeal, the Eleventh Circuit held that, because § 1480 had been repealed by the 1984 Amendments, petitioners could claim no statutory jury right (CPA 13-14); that under *Katchen* the Seventh Amendment did not apply to a trial before the bankruptcy judge (CPA 15-17); and that, even if the Seventh Amendment did apply, the fraudulent transfer claims were not "legal" ones for which a jury would be required (CPA 14-15). A petition for certiorari directed at these three determinations followed.

SUMMARY OF ARGUMENT

Because petitioners correctly concede that "[n]o statutory provisions on jury trials in bankruptcy are applicable to this proceeding" (Petitioners' Brief ("PB") 32), their creative efforts to predicate a jury right on the ghosts of statutes past are unavailing. *See* Part I. It follows, as petitioners ultimately admit, that their "right to a jury trial in this proceeding must necessarily be predicated entirely on the Seventh Amendment" (PB 33 n.7). But it is beyond dispute that the Seventh Amendment provides no fundamental rule of justice applicable in every adjudicative forum. It has no application in state courts; it has no application in federal courts of equity, such as bankruptcy courts, *see Katchen* v. *Landy*, 382 U.S. 323 (1966); and it has no application in specialized, non-Article III tribunals such as the current bankruptcy courts, which make factual determinations about federal statutory claims, with judicial review in Article III courts.

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to the decision by the bankruptcy judge. (*See* PB 30-32). The petition for certiorari raised the jury trial issue as the sole basis for upsetting the judgment. Accordingly, no *Northern Pipeline* question is before this Court.

Katchen, which held that a claimant who has received a preferential transfer is not entitled to a jury trial under the Seventh Amendment when a bankruptcy trustee seeks to avoid that transfer, cannot be understood to rest on the fiction that the claimant "waived" any Seventh Amendment right by submitting his claim against the estate to the bankruptcy court. That claimant had a *right* to submit his claim there, since Congress had left him no other option, and it "is intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons* v. *United States*, 390 U.S. 377, 394 (1968). Thus there is no distinction under the Seventh Amendment between claimants and non-claimants, and a decision for petitioners would require overruling *Katchen* v. *Landy*. *See* Part II.

Such a ruling, moreover, would disregard the basic functions of the civil jury: to serve as a check on life-tenured federal judges, not on administrative or bankruptcy tribunals whose power is already constrained by appellate review in a federal district court; and to temper with "jury equity" the rigorous application of legal rules that an equitable tribunal sitting without a jury is already free to adjust to the circumstances at hand. Those functions, and the Seventh Amendment, have no application in a bankruptcy forum. *See* Part III, A. & B. Injecting jury trials into core bankruptcy proceedings would also wreak havoc with the complex and delicate congressional scheme enacted to ensure efficient and successful reorganizations of insolvent businesses. *See* Part III, C.

In any event, even if the fraudulent transfer claims against petitioners had been filed in an ordinary court of law, the existence of analogous causes of action and forms of relief in the English law courts of the 18th century did not deprive that period's equity courts of concurrent jurisdiction and would not, even under this Court's decision in *Schoenthal* v. *Irving Trust Co.*, 287 U.S. 92 (1932), negate the quintessentially equitable nature of the restitution sought by respondent and awarded below. Thus the Seventh Amendment would not have entitled petitioners to a jury even if the forum were one in which that amendment applied. *See* Part IV.

Finally, petitioner Granfinanciera's status as the instrumentality of a foreign sovereign at the time it demanded a jury trial precluded a finding of a jury trial right for that petitioner under the Constitution or the Foreign Sovereign Immunities Act. *See* Part V.

I. PETITIONERS HAVE NO STATUTORY RIGHT TO A JURY TRIAL ON THE § 548 CLAIMS IN THIS CASE.

Petitioners readily concede that "[n]o statutory provisions on jury trials in bankruptcy are applicable to this proceeding." (PB 32.) In particular, petitioners agree that "§ 1411(a) [of the 1984 Amendments] is not applicable to the trustee's proceeding against Granfinanciera and Medex" and that "1480, the jury trial provision in the 1978 Act, is likewise inapplicable." (PB 33 n.7.)[15] As a consequence, petitioners freely admit that their "right to a jury trial in this proceeding must necessarily be predicated entirely on the Seventh Amendment" (PB 33 n.7).

Yet, in the same breath with which they make these concessions, petitioners astonishingly assert a statutory right to jury trial based not on anything Congress has enacted, but on what Congress has *not* enacted: because "Congress unambiguously opted for jury trials of fraudulent transfer and other legal actions under the [1898 and 1978 Bankruptcy] Acts, and failed to enact anything in 1984 . . . abolishing that long-standing practice," that tradition of granting jury trials in bankruptcy must have continued (PB 33). This is a remarkable theory of legislation: the ghosts of jury trial provisions in prior statutes that indisputably have been repealed and supplanted apparently live on, haunting the bankruptcy courts, unless and until Congress banishes them, point-by-point and line-by-line, with some sort of legislative incantation.

[15] Petitioners are clearly correct. *See supra* note 11 (describing the repeal of § 1480). Section 157(b) of Title 28 states that "[b]ankruptcy *judges*," and not juries, "may hear and determine" core proceedings. Nothing in § 157 in any way suggests that district courts should function as an alternative forum for purposes of jury trial proceedings. And 28 U.S.C. § 1411(a), precisely because it provides for district court jury trials for one kind of core proceeding (personal injury and wrongful death claims), and that kind only, operates as a statutory bar to any inference of implied statutory support for district court jury trials.

This Court need not rely on such ghosts of bankruptcy laws past to understand the current statute. The record is clear that in 1970, in adding § 17(c) to the 1898 Act, *see supra* note 9; in 1978, in passing 28 U.S.C. § 1480(a); and again in 1984, in enacting 28 U.S.C. § 1411(a), Congress recognized that if it failed to preserve jury trials explicitly, all claims included in the inherently equitable bankruptcy jurisdiction would be denied coverage under the Seventh Amendment. By enacting those savings clauses, Congress demonstrated that, when it wanted to, it knew how to preserve the jury rights that were found under prior jurisdictional structures: by simply decreeing that its jurisdictional expansion "shall not effect" the previous pattern of jury rights. Section 1480 of the 1978 Act was not, as petitioners' "surviving ghost" argument seems to imply, *amended* by § 1411 — it was *repealed*, as petitioners admit elsewhere in their brief (PB 33 n.7, 38). Section 1411 is now the reigning statutory law on jury trials in bankruptcy and, contrary to petitioners' belief, there is no "intractable ambiguity" in § 1411 (PB 46). It expressly preserves jury trials "with regard to personal injury or wrongful death tort claims" — *and that is it.*[16]

Petitioners are not deterred by § 1411's manifest limitation of statutory jury trial rights to personal injury cases. They reason that because § 1411(a) "does not prohibit the jury trial of any issue in any court but simply" preserves juries for certain tort actions, it is "entirely consistent with a construction that for all other legal causes of action the right of jury trial remains as it was under bankruptcy or common law." (PB 45.) But when Congress wished to achieve the latter result, as it did in 1970, 1978, and 1984, it said so. In the absence of such a congressional statement, courts of bankruptcy remain inherently equitable tribunals. *See Katchen* v. *Landy*, 382 U.S. at 336-37. Petitioners are listening to the sounds of silence and

[16] In confronting a similar argument about the historical continuity of statutory jury rights in particular bankruptcy matters in *Katchen* v. *Landy*, 382 U.S. 323 (1966), this Court began and ended its discussion with this statement: "The provisions of the Acts of 1800 and 1841 which gave the creditor the right to have his claim tried by a jury were not repeated in the Acts of 1867 and 1898." *Id.* at 331.

hearing the echo of their own desires. In this respect they go Humpty Dumpty one better: for petitioners, even an *un*spoken word apparently means exactly what they choose it to mean, neither more nor less.

Not content to read what they wish into what Congress' enactments do not say, petitioners also read the message they desire into what the legislative history does not say: "The legislative history of § 1411, or more accurately the complete lack thereof, strongly suggests that Congress . . . did not intend to abolish or limit the right to jury trial in historically legal core proceedings" (PB 38). Petitioners' argument amounts to a protest that it was stingy of Congress to make a major change in the availability of jury trials in bankruptcy without more of a fuss.

Even if one sympathizes with the desire that Congress accompany its enactments with exhaustive and well-documented debate and deliberation, that wish cannot warrant reading a statutory provision to mean something it does not say. Indeed, even if Congress had left jurisdiction over core bankruptcy matters in the federal district courts alone, where jury trials are ordinarily available, petitioners would not be assured a statutory right to a jury. For, as this Court explained in *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), "Rule 38(a) of the Federal Rules of Civil Procedure provides that the right to a jury trial 'as declared by the Seventh Amendment to the Constitution or as *given by a statute of the United States* shall be preserved inviolate.'" *Id.* at 164-65 (emphasis added by the Court). Far from stating "a general rule that jury trials are to be presumed whenever Congress provides for cases to be brought in federal district courts . . . Rule 38(a) requires an *affirmative statutory grant* of the right where, as in this case, the Seventh Amendment does not apply." *Id.* at 165 (emphasis added). In the absence of such an affirmative statutory grant, the judgment below must be affirmed; for as we shall now demonstrate, the Seventh Amendment does not apply in this case.[17]

[17] Because this case involves a *core* bankruptcy proceeding within the meaning of 28 U.S.C. § 157(b)(2), it does not implicate the question of jury trial rights in non-core proceedings, *see* 28 U.S.C. § 157(c).

II. *KATCHEN* v. *LANDY* CONTROLS THIS CASE AND REQUIRES REJECTION OF PETITIONERS' DEMAND FOR A JURY TRIAL.

In *Katchen* v. *Landy*, 382 U.S. 323 (1966), this Court held that the Seventh Amendment confers no jury rights in bankruptcy proceedings, given their equitable character. *Katchen* has repeatedly been cited as good law. For example, in *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974), the Court reaffirmed that *Katchen* "uphold[s] congressional power to entrust enforcement of statutory rights to . . . a specialized court of equity free from the strictures of the Seventh Amendment." In *Atlas Roofing Co.* v *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 454 n.11 (1977), the Court again relied on *Katchen* for the principle that bankruptcy courts are "specialized court[s] of equity" and therefore tribunals "before which a jury would be out of place." *See also Commodity Futures Trading Comm'n* v. *Schor*, 106 S.Ct. 3245, 3258 (1986).

Katchen disposes of this case. There, a creditor filed a claim on the estate of a bankrupt company; the trustee counterclaimed to recover preferential transfers which offset that claim. The district court, sitting in bankruptcy, heard the counterclaim as part of its summary bankruptcy jurisdiction and entered judgment against the creditor for the amount of the transfers. On appeal, the creditor argued (1) that, as a statutory matter, the trustee lacked the authority to seek affirmative relief on the counterclaim in the bankruptcy court, and should be forced to bring a plenary suit in a court of general jurisdiction, where the Seventh Amendment might apply; and (2) that, as a constitutional matter, the statute violated his Seventh Amendment rights if construed to authorize suit in the bankruptcy court.

Katchen's enduring legacy is its constitutional holding, because the statutory discussion focused on the now-repealed 1898 Act. Justice White, writing for the seven-Member majority, reaffirmed the long-standing proposition that the Seventh Amendment has no application in bankruptcy because "the proceedings of bankruptcy courts are inherently proceedings in equity." 382 U.S. at 336-37:

> "[I]n cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control."

Id. at 337 (quoting *Barton* v. *Barbour*, 104 U.S. 126, 133-34 (1881)).

Actions to recover fraudulent transfers, such as those brought by the trustee against petitioners, have been defined by Congress as "core proceedings" that may be heard and determined by bankruptcy judges. 28 U.S.C. § 157(b)(2)(H). (*See also* PB 24.) Petitioners readily admit that these proceedings are central to the bankruptcy process:

> The obvious purpose of §§ 548 and 550 is to allow the trustee to recover monies that are *properly part of the debtor's estate* and should be ratably distributed among creditors, but which the debtor intentionally or constuctively attempted to put beyond his creditors' reach. . . . [Fraudulent] transfers by a debtor ultimately hinder, delay, or defraud the debtor's creditors and thus are *violative of the basic policy of non-discriminatory distribution that underlies the bankruptcy law.*

(PB 12) (emphasis added).

Jury trials for fraudulent transfers, like the jury trial sought for preferential transfers in *Katchen*, would "dismember [the] scheme which Congress has prescribed." *Katchen*, 382 U.S. at 339. "[T]his Court has long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period,' and th[e] provision for summary disposition [by the bankruptcy court], 'without regard to usual modes of trial attended by some necessary delay,' is one of the means chosen by Congress to effectuate that purpose." *Id.* at 328-29 (citations omitted).

Petitioners attempt to evade *Katchen* by two routes. First, they present the Court's reasoning as uniquely intertwined with the particular statutory mechanism of the now-inoperative 1898 Act (PB 28), implying that the *Katchen* principle applies only to the specific legislation addressed in that case — as if this Court intended *Katchen* to "be treated like a restricted railroad ticket, 'good for this day and train only.'" *County of Washington* v. *Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting). Justice White's opinion for the Court makes clear that this is not the case. The opinion draws on more than a century of Supreme Court precedent, decided under various statutory regimes, establishing the principle that bankruptcy proceedings are beyond the purview of the Seventh Amendment because they are inherently equitable. Indeed, several months before *Katchen*, this Court refused to apply the statutory rule voiding all post-petition transfers of a debtor's assets, to the case of a bank which had honored a check without notice of the petition, on the ground that applying the rule would be "harsh" and "inequitable"; the Court relied on the "overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin* v. *England*, 385 U.S. 99, 102-03 (1966).

In their second attempt to distinguish *Katchen*, petitioners argue that, unlike themselves, the party accused of receiving illegal transfers in *Katchen* "voluntarily" submitted his legal claims against the estate to the bankruptcy court, and thereby consented to its jurisdiction and relinquished his right to jury trial (PB 27-29, 32). Petitioners thus believe that *Katchen* turned on "a pivotal distinction between claimants and non-claimants." (PB 29.) They declare that it was the *Katchen* petitioner's act "of claiming against the debtor's estate . . ., and nothing less," that converted his "'legal claim [as a creditor] into an equitable claim to a pro rata share of the *res*.'" (PB 29 (quoting *Katchen*, 382 U.S. at 336).)

Katchen cannot be so restricted. To begin with, *Katchen* itself stressed that the statutory provision at issue was "concerned with *creditors* rather than *claims*," 382 U.S. at 330 n.9 (original emphasis). The bankruptcy tribunal's jurisdiction ex-

tended beyond the particular claims made against the estate, and a creditor could be required to surrender an illegal preference to the estate even if it were wholly unrelated to the claims he had filed. *Id.* More importantly, the *Katchen* majority expressly refused to rest its decision on the proposition that the creditor had "consented" to the power of the bankruptcy court. *See* 382 U.S. at 333 n.9. Indeed, the Court carefully avoided that issue, which had bitterly divided the *en banc* court below, *see Katchen* v. *Landy*, 336 F.2d 535, 540-41 (10th Cir. 1964) (Phillips, J., concurring in part and dissenting in part).

Petitioners have overlooked the fact that the extent of bankruptcy jurisdiction in *Katchen* was decided on statutory, not constitutional, grounds. *See Katchen*, 382 U.S. at 335. The reasoning behind the Court's statement that " 'petitioner might be entitled to a jury trial on the issue of preference if he . . . awaited a federal plenary action by the trustee' " (PB 29 (quoting *Katchen*)), is that, as the Court found in *Schoenthal* v. *Irving Trust Co.*, 287 U.S. 92, 94-95 (1932) — petitioners' principal authority — "[s]uits to recover preferences constitute[d] no part of the proceedings in bankruptcy" *under the 1898 Act then in effect*. The fact that a party charged with taking an illegal preference had not filed a creditor's claim in the bankruptcy court was significant only because, under the 1898 Act in force when both *Katchen* and *Schoenthal* were decided, a trustee was in that event required by statute to pursue a regular action at law against the transferee in a court of general jurisdiction. *See Katchen*, 382 U.S. at 327; 11 U.S.C. § 96 (1964 ed.). The Seventh Amendment right thus turned not on the status of a defendant transferee as a claimant or a non-claimant, but on the *nature of the forum* in which the *statute* required the trustee to proceed. Since the current bankruptcy statute, as petitioners concede (PB 12, 24), no longer requires a trustee to resort to an action at law in a federal district court, and instead places fraudulent transfer claims within the core of the bankruptcy court's jurisdiction, the statutory aspects of the *Katchen* and *Schoenthal* decisions furnish petitioners with no safe harbor.[18]

[18] Language in the *Katchen* opinion referring to bankruptcy jurisdiction as covering disputes about the "res" possessed by the trustee merely describes the jurisdictional structure of the 1898 Act, *see* 382 U.S. at 336, and does not purport to define connection to the res as a constitutional requirement. Even if it did, such a requirement would be easily satisfied in this instance. Under the 1984 Amendments, the "res" is now referred to as the "estate" of the bankrupt. Under 11 U.S.C. § 541, that estate was formed at the moment the voluntary reorganization petition was filed (§ 541(a)); it includes "all legal or equitable interests of the debtor in property as of the commencement of the case" (§ 541(a)(1)); and it specifically includes "[a]ny interest in" fraudulent transfers (§ 541(a)(3)). And, as petitioners concede, *see supra* p. 15, the filing of fraudulent transfer claims is integral to the management of that estate. Petitioners make no case for drawing a constitutional distinction between bankruptcy litigation over assets *actually* in the possession of the trustee, and litigation over assets that *should* be in the possession of the trustee — and that would be, were it not for the illegal transfers to petitioners which the trustee is attempting to recoup.

Petitioners' reading of *Katchen* as resting on a claimant's "consent" to trial without a jury is not only untenable, it is deeply disturbing. Petitioners would read *Katchen* to hold that the Seventh Amendment confers a right to jury trial on third parties who are sued by a bankruptcy trustee to set aside fraudulent or preferential transfers, regardless the forum in which suit is brought, but that this fundamental right is *waived* by the "act of claiming against the debtor's estate." (PB 29.) The theory is that, because claimants "voluntarily" file their claims against the estate, they may be forced to surrender whatever rights they would otherwise have had in any separate lawsuit later brought by the trustee.

In *Katchen* this Court pointedly abjured any such rationale, *see* 382 U.S. at 333 n.9,[19] and for good reason. Although Congress may impose various conditions on a debtor's access to federally created mechanisms for voluntary reorganization or discharge in bankruptcy, *see Kras* v. *United States*, 409 U.S. 434 (1973),[20] the situation of claimants against a bankrupt's estate is radically different. The interest of a claimant

[19] This fact is especially significant given that the opinion of the court below rested solely on a consent theory. *See Katchen* v. *Landy*, 336 F.2d 535, 535-37 (10th Cir. 1964) (en banc).

[20] "There is no constitutional right to obtain a discharge of one's debts in bankruptcy." *Kras*, 409 U.S. at 446. The Court's division in *Kras* over appropriate conditions on such access, where debtors did have conceivable although not especially effective alternative mechanisms for dealing with their creditors, is irrelevant to the current situation, where claimants must deal with the bankruptcy forum or lose their claims.

in unimpeded access to the bankruptcy tribunal is constitutionally fundamental because, once a debtor has filed a voluntary bankruptcy petition, submitting to that tribunal is "the only method available to a [claimant] for the adjustment of his legal relationship" with the debtor. *Kras*, 409 U.S. at 445.[21] Given that a claimant may assert his rights *only* by filing a claim, it is clear that a claimant's "resort to the judicial process [is] 'no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.'" *Kras*, 409 U.S. at 444 (quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 376-77 (1971)).

In these circumstances, the would-be claimant's "right to use [government's] adjudicatory procedures," *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982), to vindicate either a common law interest or a statutorily created claim, "is a constitutionally protected one." *Id.* at 430. Such a statutory cause of action or statutory right to use administrative adjudicatory procedures is in fact a form of property protected by the Fifth Amendment. *Id.* at 430-31. And, although government may be "free . . . to eliminate its statutorily created causes of action altogether," *id.* at 432, it may not eliminate an individual's claim without procedural due process, *id.* — which includes "a due process right of access to the courts . . . when fundamental interests [such as property] are present and the [government] has exclusive control over 'the adjustment of [the] legal relationship[s]' involved." *Id.* at 430 n.5 (quoting *Kras*, 409 U.S. at 445).

Petitioners nonetheless suppose that in *Katchen* this Court blithely allowed Congress to require a claimant to sacrifice his jury right if he wanted an opportunity to vindicate the property right represented by his cause of action against the debtor. The choice to which petitioners' reading of *Katchen* puts bankruptcy claimants is thus "a choice between the rock and the whirlpool," which is "[i]n reality . . . no choice" at all. *Frost* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926). The Due Process Clause prohibits putting bankruptcy claimants to such a "choice" because it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons* v. *United States*, 390 U.S. 377, 394 (1968). "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost*, 271 U.S. at 593-94.[22]

The *Katchen* opinion avoided this spectre of governmental manipulation by eschewing the consent theory and instead resting on the proposition that bankruptcy jurisdiction is inherently equitable in character and that claims properly determined within that jurisdiction simply do not carry jury rights. Claimants do not "waive" rights that would be enjoyed in other forums; they simply have the claims decided in a bankruptcy forum, in which the Seventh Amendment has no application.

Even if the foregoing objection were not itself fatal to petitioners' "consent" theory, their reading of *Katchen* would create a most anomalous result. During the period before a failing company goes into bankruptcy, petitioners' reading would encourage those who are creditors of the estate, and who

[21] A claimant's interests may be vindicated only by resort to this one federal forum, because bankruptcy law affirmatively bars any other mechanism for resolving the dispute by: (1) instituting an automatic stay on the filing of the bankruptcy petition, preventing litigation by creditors in any other court, *see* 11 U.S.C. § 362; (2) banning any voluntary side settlements (under the rules barring preferential transfers) except in a binding settlement which requires the agreement of other creditors, *see, e.g., id.* § 547; and (3) banning all other self-help measures, including any attempt to collect on a former debt once a reorganization plan has become effective, *see id.* § 1141.

[22] *Frost* involved the imposition of an unconstitutional condition on access to a governmental *privilege* rather than a fundamental right: even withholding a governmental privilege or gratuity from those who will not surrender a constitutional right may in some circumstances represent a forbidden form of governmental "extortion." *See, e.g., Nollan* v. *California Coastal Comm'n*, 107 S.Ct. 3141, 3147-48 (1987) (state may not condition issuance of beachfront building permit on applicant's uncompensated grant of an easement, where easement would not advance the purpose served by state regulation of beachfront construction); *United States* v. *Jackson*, 390 U.S. 570, 581 (1968) (even if not coercive, government's offer to impose less severe sentence on those who will surrender right to jury trial is impermissible). *Accord, Hobbie* v. *Unemployment Appeals Comm'n*, 107 S.Ct. 1046, 1049 (1987); *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984); *Speiser* v. *Randall*, 357 U.S. 513, 518-19 (1958). But withholding access to the federal bankruptcy forum from contract, tort, or property claimants unless they surrender the Seventh Amendment right petitioners believe they possess would amount not simply to the withholding of a *gratuity* from those who will not waive the Seventh Amendment, but to the withdrawal of a *Fifth Amendment right* — the right to invoke the only legal process through which government permits one to vindicate a claim.

are receiving fraudulent or preferential transfers, to attempt even larger diversions of the company's assets. For, on petitioners' reading, only an entity which is so successful in stealing from the company that it recoups the entire claim (or so great a proportion of the claim as to eliminate the economic incentive to bother claiming the remaining amount) can qualify for a jury trial under the Seventh Amendment if the trustee brings an action to recover the transfers. A creditor who is less audacious must either drop his claim or file it and thereby give up his jury trial right. At the very least, a non-claiming creditor wishing to hold on to his ill-gotten gains could force the court to examine the jury issue, thereby gaining delay and bargaining leverage.

Seventh Amendment rights have never turned on such contingencies. If there is a jury right in a particular civil matter, normally either side may claim it. Surely the petitioners cannot be correct in arguing that *Katchen* construed the Seventh Amendment as rewarding persons for illegal conduct threatening the interests of the debtor and the other creditors, as well as the integrity of the bankruptcy process itself.

The manifest unpersuasiveness of petitioners' attempt to read *Katchen* as endorsing coerced waiver of Seventh Amendment rights has important implications for their entire argument. Petitioners seek to persuade this Court that enforcement of the Seventh Amendment here has few implications: fraudulent transfers to recipients not presenting claims in bankruptcy, they assume, are rare. Respondent is not prepared to accept that assumption. But in any event it is clear that, if petitioners are unsuccessful in their effort to distinguish *Katchen* from this case by drawing a line between transfers to claimants and transfers to nonclaimants, and if this Court were to hold that the Seventh Amendment requires a jury trial in this case, limiting such a holding would be a matter of overwhelming importance for bankruptcy administration.

If this Court rules for petitioners but properly rejects their theory of coercive waiver, and thus their distinction between claimants and nonclaimants, jury trials could be demanded by all recipients of funds fraudulently transferred under 11 U.S.C.

§ 544 or § 548. Moreover, on petitioners' theory, a Seventh Amendment right ought to apply in § 547 preferential transfer proceedings as well: if the claimant/nonclaimant distinction is rejected, how do § 547 and § 548 proceedings differ for Seventh Amendment purposes?

Petitioners must therefore be understood as attempting a radical assault upon the usual assumptions of bankruptcy procedure. Unless this Court is prepared to read *Katchen* as adopting a coercive waiver approach which that decision in fact carefully and correctly avoided, the Court can rule for petitioners *only* by overruling *Katchen* — opening the way for a dramatic increase in jury trials in bankruptcy. Indeed, jury trial rights might have to be recognized in proceedings beyond those conducted under §§ 544, 547, and 548. For example, anyone whose contract or business tort claim against the debtor is disputed, and who would have been able to assert a jury trial right outside bankruptcy, would — if petitioners prevail — be able to claim a right to jury trial in bankruptcy proceedings. Without petitioners' untenable theory of coercive waiver, there is no natural limit to the reach of their argument. They would truly "dismember the statutory scheme." *Katchen*, 382 U.S. at 339.

III. THE SEVENTH AMENDMENT DOES NOT APPLY TO THE § 548 CLAIMS IN THIS CASE BECAUSE THEY WERE HEARD AND DETERMINED BY A SPECIALIZED FORUM ADJUDICATING RIGHTS AND IMPLEMENTING POLICIES PURSUANT TO CONGRESS' PLENARY BANKRUPTCY POWER.

The Seventh Amendment issue in this case is easier to resolve than the one this Court confronted in *Katchen*. The petitioner there was able to advance a colorable Seventh Amendment argument only because the preference action was heard by a district court — an ordinary court of law established under Article III — which was sitting in bankruptcy as prescribed by the Bankruptcy Act of 1898. In such a court, the Seventh Amendment was at least *potentially* applicable. In contrast, the

core bankruptcy matter at issue in this case was heard and resolved by a non-Article III judge in a specialized bankruptcy tribunal to which the Seventh Amendment simply does not apply. As Dean Paul Carrington recently explained to Congress, the values guarded by that amendment are not implicated outside the context of an Article III court:

> We have kept the civil jury as a check not on the executive or the Congress, but as a check on the federal judge whose life tenure makes those officers suspect to those of us raised on the Populist traditions of this country. The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge. [This function] has little application to non-traditional civil proceedings such as those which occur in bankruptcy or in administrative forums . . . [where] power and authority are already divided. The administrative law judge may be distrusted, but he is subject to an array of accountabilities unknown to the United States District Judge, including appellate review by such a judge. The condition of autocracy which would bring the underlying values of the Seventh Amendment [into play] is not present; the right to jury trial therefore has no application.

Fair Housing Amendment Act of 1987 (S. 558), Hearings Before the Subcommittee on the Constitution of the Committee on Judiciary, U.S. Senate, 100th Cong., 1st Sess. 572-73 (June 4, 1987) (Statement of Dean Carrington). *Accord*, *id.* at 684 (Statement of Prof. Rowe); *id.* at 837 (Statement of Prof. Hazard).

A jury in an equitable tribunal such as a bankruptcy court would in a sense be redundant. Like a judge exercising the power of equity to do justice and to avoid unfair hardship in the case before him,[23] a jury in a court of law "knocks off many

[23] See the 18th-century cases discussed *infra* pp. 37-38, where courts of equity denied recovery to creditors seeking to recover fraudulent transfers, on the grounds that avoiding the transfer would be unjust or work undue hardship. *See also Bank of Marin* v. *England*, 385 U.S. 99 (1966), discussed *supra* p. 15.

rough edges of the law." 5 *Moore's Federal Practice* § 38.02 (2d ed. 1948). The traditional role of the jury in modifying and moderating the strict rule of law — also referred to as "jury equity" — has a necessary place in courts of law precisely because the court itself is understood to be bound to observe the letter of the law, and not to be free, as an equitable tribunal is, to temper the law to the circumstances at hand.

A. The Seventh Amendment Assures a Jury Trial Only in Actions "At Law" Before a Tribunal Customarily Using a Jury as its Fact-Finding Arm.

The Constitution's preservation of civil jury trials in " 'Suits at common law' has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary," *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 449 (1977). *See also Tull* v. *United States*, 107 S.Ct. 1831, 1835 (1987) ("a jury trial was customary in suits brought in the English *law* courts") (original emphasis). Justice Story long ago explained the Seventh Amendment's exclusive focus on issues of law tried in the Article III district courts: "By *common law*, [the Seventh Amendment's Framers] meant what the constitution denominated in the third article 'law;'. . . suits in which *legal* rights were to be ascertained and determined, in contradistinction to those [actions] where equitable rights alone were recognized, and equitable remedies were administered; or where . . . a mixture of public law, and of . . . equity, was often found in the same suit." *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) (emphasis added).

Historically, "the question whether a fact would be found by a jury turned to a considerable degree on the nature of the forum in which a litigant found himself." *Atlas Roofing*, 430 U.S. at 458. When legal rights are enforced "in an ordinary civil action in the district courts, . . . there is obviously no functional justification for denying the jury trial right," *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974), because that forum "customarily employs a jury." *Atlas Roofing*, 430 U.S. at 454

n.12. Conversely, this Court has long "uph[e]ld congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment," *Curtis*, 415 U.S. at 195, because those are tribunals "before which a jury would be out of place and would go far to dismantle the statutory scheme." *Atlas Roofing*, 430 U.S. at 454 n.11.

Petitioners contend that the Seventh Amendment right attaches to any statutory cause of action with "well-established common law antecedents" regardless of the forum to which Congress has entrusted its resolution. (PB 30.) That theory cannot be reconciled with this Court's decisions, and petitioners, apparently recognizing this fact, make no attempt to do so. For it has been the "'settled judicial construction' . . . 'from the beginning'" that the Seventh Amendment does not "render[ ] Congress powerless — when it conclude[s] that remedies available in courts of law [are] inadequate to cope with a problem within Congress' power to regulate — to create new public rights and remedies by statute and commit their enforcement . . . to a tribunal other than a court of law . . . in which facts are not found by juries." *Atlas Roofing*, 430 U.S. at 460 (citation omitted).

In *Block* v. *Hirsh*, 256 U.S. 135 (1921), this Court sustained legislation suspending landlords' ancient common law action in ejectment and "relegating them to an administrative factfinding forum," *Atlas Roofing*, 430 at 451-52. The statute in *Block* was challenged on the ground that "landlords and tenants [were] deprived by it of a trial by jury on the right to possession of the land." *Id.* at 452. The *Block* Court summarily rejected this challenge: "'*If the power of the Commission established by the statute to regulate the relation is established, . . . this objection amounts to little.*'" *Id.* at 452 (original emphasis) (quoting *Block*, 256 U.S. at 158). Similarly, in *Crowell* v. *Benson*, 285 U.S. 22 (1932), the Court upheld a statute that "displaced a traditional cause of action and affected a pre-existing relationship based on a common-law contract for hire." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 587 (1985). *See also Atlas Roofing*, 430 U.S. at 452

(quoting *Crowell* with approval). Finally, in cases involving challenges to bankruptcy proceedings, this Court has uniformly held that "incidental questions . . . which would ordinarily be pure cases at law, and in respect of their facts triable by jury, . . . become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control." *Barton* v. *Barbor*, 104 U.S. at 134 (quoted with approval in *Katchen*, 382 U.S. at 337). Thus the "Bankruptcy Act, passed pursuant to the power given to Congress by Art. I, § 8, . . . converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*." *Id.* at 336.

In each of those cases, as in this one, the party invoking the Seventh Amendment had no choice in the matter. Through no act of his own, and without his consent, that party had his jury-triable, legal cause of action replaced by a statutory claim whose underlying facts would be determined not by a jury but by a specialized tribunal of Congress' making. Yet these cases, as this Court has unanimously concluded, "clearly stand for the proposition that when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment[ ] . . . . This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency." *Atlas Roofing*, 430 U.S. at 455.

B. The Bankruptcy Court is a Specialized, Non-Article III Tribunal That Does Not Use Juries as Fact-Finders.

Petitioners do not dispute directly the proposition that the Seventh Amendment is simply inapplicable where § 548 claims are decided by a special forum that does not "customarily utiliz[e] a jury as its factfinding arm." *Atlas Roofing*, 430 U.S. at 461 n. 16. Apparently recognizing the futility of a frontal assault, petitioners seek to evade the obstacle posed by this Court's cases. They contend, remarkably, that the § 548 claim was *not* actually decided by a specialized bankruptcy tribunal

incapable of customary use of a jury (PB 23-25). Petitioners instead imagine that the § 548 claim was decided by some sort of magistrate or special master in an advisory opinion submitted to the district court. It was not. Under the 1984 Amendments, bankruptcy judges "exercise the authority conferred under this chapter with respect to any action, suit, or proceeding" and are empowered to "preside alone and hold a regular or special session of the court," 28 U.S.C. § 151. Petitioners concede that a fraudulent transfer claim is a "core proceeding" in the bankruptcy court (PB 24). *See* 28 U.S.C. § 157(b)(2)(H). Bankruptcy judges "may hear and determine all cases arising under title 11 and all core proceedings arising under title 11, or in a case under title 11, . . . and may enter appropriate orders and judgments, subject to review . . . ." 28 U.S.C. § 157(b)(1). Appeal lies to the district court, 28 U.S.C. § 158(a), "in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts . . . ." 28 U.S.C. § 158(c). The claim at issue here was referred by the district court to the bankruptcy tribunal for final decision, subject only to appellate review. The district court never withdrew that reference. After decision, the district court had no special authority to review the decision *de novo*; the normal appellate rules applied, and petitioners appealed the judgment in the normal fashion.

Since it is obvious that the § 548 claim was in fact decided by the bankruptcy judge rather than by the district court, petitioners have only one remaining argument — that the claim was *constructively* decided by the district court. They argue that, no matter how much it "appear[s]" that the bankruptcy tribunal operated, as such tribunals do in the vast majority of core cases, independently of the district courts, these tribunals have no separate existence (PB 24). They are, we are told, mere illusions — phantom limbs of the district courts — because Congress has vested " 'original but not exclusive jurisdiction of all proceedings arising under title 11' " (PB 24) (quoting 28 U.S.C. § 1334(b)), in the district courts, which then parcel out core claims for final decision by bankruptcy tribunals.

Petitioners ignore reality. Bankruptcy tribunals are authorized to exercise final power over core matters in bankruptcy, subject only to appellate review in an Article III court. The fact that this power is exercised only after referral from a district court is irrelevant. Petitioners suggest that, because a particular claim theoretically need not have been decided by the bankruptcy tribunal, it was not in fact so decided. But discretionary transfers by one decisionmaker to another, who then makes a binding decision subject to judicial review, are commonplace in our system. Petitioners simply disregard what they find inconvenient.

Petitioners would stretch reality — and this Court's credulity — even farther. To support their contention that the bankruptcy court is an Article III tribunal in which civil actions are governed by the Seventh Amendment, petitioners insist that "[o]ne component of the authority [that] bankruptcy judges . . . must either inherently possess or that is impliedly transferred with the transfer of the adjudi[illegible]ory power itself, is the authority to employ a jury as a finder of fact." (PB 25.) Yet petitioners concede that "bankruptcy judges under the 1984 Amendments are non-article III judges because they lack [the] tenure and salary guarantees of that article, 28 U.S.C. §§ 152, 153" (PB 30), and they offer no way to reconcile their belief that bankruptcy judges can conduct jury trials either with the clearly contrary indications of the 1984 Amendments, or with this Court's decision in *Northern Pipeline*.[24] Despite petitioners' efforts at prestidigitation, the bankruptcy courts remain specialized, non-Article III forums that do not customarily make use of juries.

[24] Petitioners strive to avoid this glaring contradiction in their own position by suggesting a distinction between a bankruptcy judge's supposedly undoubted "authority to employ a jury as a finder of fact" (PB 25), and his admittedly dubious authority actually to "preside[ ] over a jury trial" (PB 25 n.4) — a task he might have to send back to the district court. This attempt to have it both ways is transparently unavailing.

C. The Use of Juries To Resolve Core Matters in Chapter 11 Reorganization Proceedings Would Significantly Impair the Ability of Bankruptcy Courts To Achieve Congressional and Constitutional Objectives.

This Court ruled unanimously in *Atlas Roofing* that the Seventh Amendment does not prevent Congress from assigning "new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency." 430 U.S. at 455. The concern animating this conclusion is in part a desire to avoid "chok[ing] the already crowded federal courts with new types of litigation." *Id*. But the aim is also to obtain the benefit of the "special competence" that a more narrowly focused tribunal is able to acquire and bring to bear.

In setting forth the bankruptcy power in broad terms, the Framers "clearly understood that they were not building a strait-jacket to restrain the growth and shackle the spirits of their descendants for all time to come; they were devising a political instrumentality which, while firm, was nevertheless to be flexible enough to serve the varying social needs of changing generations." C. Warren, *Bankruptcy in United States History* 4 (1935). The bankruptcy power has developed "from being a regulation of traders for purely commercial purposes," to a "[n]ational policy . . . for the restoration of business life," to "statutory methods of relief . . . based on the interest of the Nation at large," *id*. at 8-9. As Henry Clay put it, "[t]he right of the [Nation] to the use of the unimpaired faculties of its citizens as producers [and] as consumers . . . is paramount to any rights or relations which can be created between citizen and citizen . . [and] to any supposed rights which appertain to a private creditor. This is the great principle which lies at the bottom of all bankrupt[cy] laws." *Id*. at 159.

It was in this spirit that Congress in 1978 substantially revised existing corporate reorganization procedures, placing

bankruptcy judges in charge of a complex system for protecting, policing, coordinating, and reviewing efforts of business debtors and their creditors to reformulate existing obligations without thereby terminating ongoing businesses. *See* 11 U.S.C. §§ 1101 *et seq*. In 1984, Congress confirmed the importance of the role performed by bankruptcy judges in Chapter 11 cases, not only identifying "confirmations of plans" and "estimation of claims or interests for the purposes of confirming a plan under Chapter 11" as "core proceedings," 28 U.S.C. § 157(b)(2)(B) & (L), but also including within the definition of core proceedings other crucial determinations made by bankruptcy courts in Chapter 11 cases, pertaining both to the "administration of the estate" and the "adjustment of the debtor-creditor relationship." *Id*. § 157(b)(2)(A) & (O). Indeed, § 157(b)(2) groups together all of the principal determinations a Chapter 11 case is likely to require a bankruptcy judge to make. As will shortly become clear, if Seventh Amendment jury trial rights were recognized in selected Chapter 11 proceedings, whether in § 548 hearings only or in § 547 inquiries as well, the risk of paralyzing delay, division of responsibility (if the district court conducts the jury trial), diversion of time and resources (if the bankruptcy court conducts the jury trial), and frustration of the process of plan confirmation (regardless of which court administers jury trials), would jeopardize the rewards of specialization and continuity, resulting from the focused administration of the bankruptcy court, which the Chapter 11 statutory framework presupposes.

At the outset, two observations are in order. *First*, even though bankruptcy courts are not customarily labeled "administrative agencies," *Atlas Roofing* states principles applicable to this case. Bankruptcy judges are not Article III judges, *see* 28 U.S.C. § 152, and in this respect they differ in no relevant way from members of the Federal Trade Commission, the Securities Exchange Commission, the National Labor Relations Board, or other such agencies. If bankruptcy judges execute their congressionally ordained responsibilities through the use of adjudicative procedures, their mode of acting again distinguishes them in no pertinent way from members of at least

some other agencies. *See, e.g., Humphrey's Executor* v. *United States*, 295 U.S. 602, 624 (1935).

Second, even though a Chapter 11 reorganization has as its objective "the adjustment of the debtor-creditor or the equity security holder relationship," 28 U.S.C. § 157(b)(2)(O), it is clear that the public interest is directly affected. The inclusion in Article I, § 8, cl. 4, of the Constitution of express authority to establish "uniform Laws on the subject of Bankruptcies" is evidence enough. "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." *The Federalist* No. 42 (J. Madison) at 287 (J. Cooke ed. 1961).

This Court has early and late acknowledged the specific public concerns informing congressionally defined reorganization procedures. Thus, in *Barton* v. *Barbour*, 104 U.S. 126 (1881), the Court signaled broad approval of receiverships by noting that the insolvency of a railroad required "the exercise of large and modified forms of control over its property by the courts charged with settlement of its affairs and the disposition of its assets." *Id.* at 135. It was apparent that the "old method" of administering the bankrupt estate, that "of shutting down and stopping by injunction all operations," and taking the property as "found at the instant of stoppage, and selling it, . . . would often be highly injurious and result in a total sacrifice of the property" — a significant "public injury" even though the corporation was in private hands. *Id.* These concerns were sufficient to justify an injunction barring an ordinary trial court from hearing a tort suit brought against the receiver who was operating the railroad under bankruptcy court supervision — even though the plaintiff was thereby relegated to the bankruptcy forum and lost the jury right she would have enjoyed had the suit proceeded in the ordinary court. *Id.* at 133-34.

More recently, in *NLRB* v. *Bildisco and Bildisco*, 465 U.S. 513 (1984), this Court emphasized that the "fundamental purpose of reorganization is to prevent a debtor from going into

liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Id.* at 528. These objectives, reflecting "the policies of flexibility and equity built into Chapter 11," *id.* at 525, give rise to a specialized regulatory responsibility, to prevent, in Madison's words, "frauds where the parties or their property may . . . be removed" or, as this Court said in *Bildisco*, to prevent "possible misuse of economic resources" arising from the attempts of parties affected by reorganization procedures either to limit the impact of reorganization or to exploit the reorganization process itself. Dean Thomas Jackson has described the problem this way:

> Once a debtor becomes insolvent (or is thought likely to become insolvent), each creditor has an incentive to engage in a race for assets, not just to assure itself that it will get paid in full, but also because the creditor knows that, if it does not race, and its fellow creditors do, it will be left with nothing.

T. Jackson, *The Logic and Limits of Bankruptcy Law* 124 (1986). The solution is the unified supervision of the reorganization process:

> The use of individual creditor remedies may lead to a piecemeal dismantling of a debtor's business by the untimely removal of necessary operating assets. To the extent that a non-piecemeal collective process (whether in the form of a liquidation or reorganization) is likely to increase the aggregate value of the pool of assets, its substitution for individual remedies would be advantageous to the creditors as a group.

Id. at 14.[25]

[25] A distinction should be drawn between regulatory concerns intrinsic to the reorganization process itself, which are the business of the bankruptcy judge, and extrinsic regulatory policies, derived from other federal or state statutes, which may either limit the usual reach of bankruptcy rules, *see, e.g.*, 11 U.S.C. § 362(b)(4), or require decision by a nonspecialist district court, *see* 28 U.S.C. § 157(d). The regulatory objectives that would be frustrated by recognition of jury trial rights in Chapter 11 proceedings are intrinsic to the bankruptcy process itself.

The role of the bankruptcy judge in Chapter 11 reorganizations: The ultimate objective of a Chapter 11 case is the production of a "plan of reorganization." *See* 11 U.S.C. § 1123.[28] The decision whether to confirm a proposed plan, taking into account elaborate statutory criteria, is the responsibility of the bankruptcy judge. *See id.* § 1129.

A reorganization is as much a negotiation, organized through the voting procedure, as it is an adjudication. The statutory scheme imposes obligations and organizes the dealings of the affected parties in ways which bear directly upon the process of plan formulation. Committees of creditors and equity security holders are constituted, *see id.* § 1102, and empowered to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuation of such business, and any other matter relevant to the case or to the formulation of a plan," *id.* § 1103(c)(2). If appointed, a trustee possesses similarly broad investigatory powers, in addition to the traditional bankruptcy authority to scrutinize and object to proofs of claims, and invoke judicial process (if necessary) to marshall the property of the estate. *See id.* §§ 1106, 704.

In advance of any confirmation proceeding, the chief business of the bankruptcy court is the management of the process by which affected parties reach and state their decisions. Three distinct responsibilities must be exercised. *First*, because the business of the debtor continues during the course of the Chapter 11 case, *see* 11 U.S.C. § 1108, under the administration of a trustee, *see id.* § 1104, the bankruptcy court must resolve any disputes that arise concerning the conduct of the trustee. *See id.* § 1104. More importantly, the bankruptcy court must

[28] Accordingly, the plan indicates whether or not, assuming it is confirmed, the legal, equitable, and contractual rights to which a claim or interest entitles the holder would be left unaltered or instead impaired, *see* 11 U.S.C. §§ 1123 (a)(2) & (3); 1124. The plan also describes the means by which it will be implemented — including retention or sale of property of the estate; assumption, rejection or assignment of any executory contract or unexpired lease; merger of the debtor; satisfaction, modification, cancellation, cure or waiver of any obligation; amendment of the debtor's charter; or issuance of securities by the debtor, *see id.* § 1123(a)(5), (b). A confirmed plan binds all affected parties, and constitutes a discharge in bankruptcy. *See id.* § 1141.

resolve a wide range of issues arising from the continued operation of the bankrupt business, *see id.* §§ 363, 364, 365, 1113, including the allowance of wages, salaries, commissions, taxes and other necessary expenses, *see id.* § 503, which if allowed take precedence over claims of pre-existing creditors, *see id.* § 507(a)(1).

Second, the bankruptcy court regulates the speed at which the reorganization proceeds. During the first 120 days of a reorganization, only the debtor may propose a reorganization plan, *see* 11 U.S.C. § 1121 (a) & (b). If the debtor fails to file within this time, or fails to obtain acceptance within 180 days, any interested party may file a plan, *see id.* § 1121(c). These time periods may be extended by the bankrupty court. *See id.* § 1121(d).

Third, the bankruptcy court protects the reorganization process from disintegration. The automatic stay afforded by 11 U.S.C. § 362 blocks efforts by interested parties to initiate or continue legal proceedings alternative to, and therefore potentially in conflict with, a Chapter 11 reorganization. But because the stay may in certain cases unduly burden affected interests or thwart regulatory objectives independent of bankruptcy policy, the bankruptcy court may lift, condition, or modify the stay in light of statutory criteria. *See, e.g.*, 11 U.S.C. § 362(b), (d) & (e); *see also id.* § 361. Moreover, the Bankruptcy Code seeks to ensure that property of the estate which is in the control of creditors and third parties be returned to the trustee to further the reorganization or the satisfaction of the estate's debts. These provisions, including § 548 governing pre-bankruptcy fraudulent transfers, and § 547 addressing pre-bankruptcy preferential transfers, all depend upon bankruptcy court enforcement in the event of dispute. *See, e.g. id.* §§ 543(c) & (d), 544, 545, 547, 548, 549; *see also* 28 U.S.C. § 157(b)(2)(E), (F), (H) & (K).

The adverse effect of jury trials upon bankruptcy court management of Chapter 11 reorganizations: Against this backdrop, the risks and disadvantages of jury trials are apparent. If such trials are held in the district courts, the delay occasioned by whatever waiting period the district court docket dictates may

be considerable, extending the reorganization process well past the 180-day period set as the statutory norm. This delay may require the bankruptcy court to restrict allowance of administrative expenses, or to reconsider the reasonableness of automatic stays, thus undermining the operation of the business or the integrity of the reorganization process itself.[27] If the bankruptcy court itself conducts the jury trials, the time spent is time diverted from other matters of case administration, depriving the court of knowledge of the actual progress of the reorganization crucial in ruling on various matters.

The disruptive effect of jury trials is especially significant in the context of fraudulent or preferential transfer proceedings. Preventing piecemeal distribution of the estate's assets prior to bankruptcy is doubly important because reorganization has the dual aims of being fair to all affected interests and of enabling the debtor's business to go on. A fraudulent transfer depletes the estate to the detriment of all creditors and reduces the assets available for the reorganization. As petitioners concede, the "obvious purpose" of § 548 "is to allow the trustee to recover monies that are properly part of the debtor's estate and should be ratably distributed" (PB 12). Petitioners further concede that even under 18th-century English law, a fraudulent transfer was not only an injury to the estate but "a fraud upon the bankruptcy law itself," an attempt to defraud " 'the public laws of the land.' " (PB 13.)

[27] A Chapter 11 reorganization depends heavily upon the availability of the automatic stay, *see* 11 U.S.C. § 362, in order to preserve business assets of the debtor which may be pledged as collateral to secured creditors. A temporary bar to repossession may keep the business afloat for the benefit of all creditors, and obtain time to formulate a plan acceptable to, among others, such secured creditors. But if delay becomes too severe, the secured creditors may obtain relief on the theory that an "effective," that is, timely, reorganization has ceased to be possible. *See* 11 U.S.C. § 362(d)(2); *United Savings Ass'n. v. Timbers of Inwood Forest*, 108 S. Ct. 626, 632 (1988). Indeed, in *Timbers*, this Court acknowledged precisely the risk of "inordinate and extortionate delay," in denying a secured creditor the relief sought from an automatic stay — on the assumption that "an effective reorganization" remained "*in prospect*." *Id.* (emphasis in original). The delay caused by the view taken by petitioners would remove that ground for protecting the reorganization process.

The procedure used to recover fraudulent transfers deeply affects the process of plan formation. If the assets illegally transferred are substantial, their recovery will have a profound influence on the terms of and the success of any proposed reorganization plan. The question of recovery must therefore be resolved early in the reorganization process. Furthermore, prompt disposition of fraudulent transfer claims is crucial because of the time pressures of the reorganization process. If the 120-day limit for reorganization proposals must be extended because of delay attributable to the jury trial of a fraudulent transfer claim, *see* 11 U.S.C. § 1121(d), changes in circumstances may alter the negotiating context, thereby frustrating the process of plan formation. And if delay becomes a variable within the control of an interested party, the risk of opportunistic behavior is obvious. That risk is particularly acute in cases like the present one, where the party seeking to drag things out by way of jury demands is the very party found by the bankruptcy judge to have benefitted from a looting of the corporate coffers prior to the filing of the debtor's bankruptcy petition.

The jury trial right which petitioners claim, especially if it required a transfer of the case back to the district court, plainly imperils the objectives of Chapter 11. The probability of substantial delay, given the current logjam in most district courts, is obvious. Moreover, allowing a Seventh Amendment inquiry would give the recipients of fraudulent transfers ample room for manipulation: they could seek to secure such a right by converting assets to cash or (under petitioners' construction of *Katchen*, *see* Part II, *supra*), by declining to assert a creditor's claim. The ability to trigger an inquiry into whether the precise claim at issue carries a jury right, and thus delay the proceeding, would give the recipient a powerful bargaining chip allowing him to force the trustee to accept favorable settlement terms as the price of a waiver of jury trial.

The fact that § 548 claims may be susceptible of resolution by juries in traditional judicial forums, and the fact that Congress may have provided for jury trials of such issues in the past, does not mean that Congress is constitutionally required to continue to entrust initial resolution of such claims to Article

III courts and their juries. Jury trials are functionally incompatible with the Chapter 11 reorganization process and would " 'dismember' the statutory scheme" of the bankruptcy statute. *Curtis*, 415 U.S. at 195 (quoting *Katchen*, 382 U.S. at 339). The Seventh Amendment is therefore no bar to a legislative judgment that such core bankruptcy issues be resolved by bankruptcy court judges.

IV. EVEN IF ISSUE-BY-ISSUE DETERMINATION OF JURY RIGHTS WERE REQUIRED IN THIS CASE, THE § 548 CLAIMS WERE PROPERLY TRIED WITHOUT A JURY BECAUSE THE TRUSTEE'S COMPLAINT SOUNDED IN EQUITY AND SOUGHT THE EQUITABLE RELIEF OF RESTITUTION.

Even if the Seventh Amendment were to apply in this forum to this core bankruptcy claim, there would still be no jury right on the record below. Petitioners' argument that they are entitled to a jury trial because the § 548 action can be analogized to actions seeking legal remedies that existed at common law in 1791 is premised on a misrepresentation of English legal history, a misreading of the complaint in this case, and a complete misunderstanding of the function of § 548.

A. Courts of Equity Have Traditionally Had Concurrent Jurisdiction Over Actions Contesting Fraudulent Transfers.

As this Court reaffirmed in *Tull* v. *United States*, 107 S. Ct. 1831 (1987), the Seventh Amendment applies in an appropriate forum to some statutory claims that are "analogous" to " 'Suits at common law' ":

> To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought.

> First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.

Id. at 1835 (citations omitted).

With respect to the first part of this test, petitioners peruse the English case reports and conclude that suits to recover preferences from creditors were tried in the courts of law (PB 12-18). The Court should first note petitioners' implicit concession that the nature of the forum (law, equity, or otherwise) is critical to the existence of jury rights — the very point that they elsewhere ignore and that requires affirmance of the judgment below. *See* Parts II & III, *supra*. In any event, petitioners' lengthy review of cases where fraudulent preferences were recovered in actions at law proves only that the law courts had jurisdiction to hear such matters and to provide relief, not that their jurisdiction was exclusive. Petitioners' statement that "equity would not entertain an action for the return of fraudulently transferred monies or goods" (PB 17), is patently false. Worse, it is contradicted by their own authorities.

For example, petitioners present *Ex parte Scudamore*, 3 Ves.Jun. 85, 30 Eng.Rep. 907 (1796), as a case in which the Chancellor declined to order restitution of money alleged to have been fraudulently transferred, stating that the Chancellor did not "think" he could "make that order." (PB 17.) But the preceding page of the opinion, as well as the portion that petitioners saw fit to replace in their quotation with ellipses, makes plain that the Lord Chancellor denied relief *not* because it was beyond his power to grant it, but because it would be inequitable on the merits to do so. *See* 3 Ves.Jun. at 88, 30 Eng.Rep. at 908-09.

Petitioners likewise misrepresent *Hobbs* v. *Hull*, 1 Cox 446, 29 Eng.Rep. 1242 (1788), in which the court actually declared that "Courts of Equity have most certainly been in the habit of exercising a concurrent jurisdiction with the Courts of Law on the statutes of Elizabeth respecting fraudulent conveyances;

but whenever they have found a case of great hardship they have generally left the creditor to his remedy at law." *Id.* Accordingly, the plaintiff in *Hobbs* was denied relief by a court of equity *not* because it lacked jurisdiction (*compare* PB 17 (stating the opposite)), but because the court determined that it would be an unjust hardship to recover, for an insolvent husband's creditors, the income he had conveyed to his divorced wife for the maintenance of their children. *See* 1 Cox at 446, 29 Eng.Rep. at 1242.

Hobbs and *Scudamore* are thus perfectly consistent with Justice Story's statement that "Courts of Equity . . . give full effect to all the provisions to protect the rights and interests of creditors, and exert their jurisdiction upon the same construction of these statutes [of Elizabeth], which is adopted by Courts of Law." 1 J. Story, *Commentaries on Equity Jurisprudence* § 352 (1836). In particular, Justice Story noted that Chancellor Kent maintained that "Courts of Equity ought to interfere, and grant remedial justice, whether the property could be reached by an execution at law, or not; for otherwise a debtor under shelter of it might convert all his property into stock, and settle it upon his family, in defiance of his creditors, and to the utter subversion of justice." *Id.* at § 368. That hypothetical is relevant to the case at hand, where the individual in control of the debtor corporation (who is now in prison) raided the company till and transferred money abroad to finance personal and family expenditures. American practice is consistent with Chancellor Kent's suggestion: "Equity has always had jurisdiction of fraud, misrepresentation, and concealment." *Jones* v. *Bolles*, 76 U.S. (9 Wall.) 364, 369 (1869). "In cases of fraud, equity has a concurrent jurisdiction with a court of law." *Gaines* v. *Chew*, 43 U.S. (2 How.) 619, 645 (1844).

Although there may have been a period in American legal history, prior to the merger of law and equity in 1938, when the possibility of bringing an analogous action in a court of law *or* a court of equity in 18th-century England sufficed for some courts to require that the action be brought in an American court of *law*, that is certainly no longer the case. The history of concurrent jurisdiction contained in the 18th-century precedents and statutes which petitioners distort has uniformly led modern courts of appeals, whatever the differences among lower courts, to conclude that fraudulent transfer claims may be tried at equity — by bankruptcy tribunals without the aid of a jury.[28]

B. The Restitution of Fraudulently Transferred Property Sought by the Trustee is a Traditionally Equitable Remedy.

This Court has recognized that the "'abstruse historical' search for the nearest 18th-century analogue" is often inconclusive, turning up both equitable and legal analogues for a particular modern cause of action. *Tull*, 107 S.Ct. at 1837. When that happens, as it did in *Tull*, the contest to label the cause of action is announced a draw, and the second part of the test is applied: "characterizing the relief sought is '[m]ore important' than finding a precisely analogous common law cause of action in determining whether the Seventh Amendment guarantees a jury trial." *Id.*

Petitioners suggest that the issue in this case is whether there is a jury right "where the only relief the trustee requested was money *damages*." (PB i (emphasis added).) Merely because the trustee sought a return of money fraudulently transferred does not mean that he sought damages *at law*. Rather, he sought restitution of fungible property improperly transferred — a quintessentially *equitable* aim. The first paragraph of the Complaint states that "[t]his is an action to avoid fraudulent transfers and to *recover* those transfers." (CPA 37 (emphasis

[28] *See, e.g., Damsky* v. *Zavatt*, 289 F.2d 46, 53 (2d Cir. 1961) (per Friendly, J.) (an action by a "trustee in bankruptcy to set aside a fraudulent conveyance has long been cognizable in equity") (citing *Hobbs* v. *Hull*); *id.* at 54 ("Congress, consistently with the Seventh Amendment, may extend . . . the same rights to sue in equity to set aside a fraudulent conveyance that were held in 1791 by judgment creditors under the Statute of Elizabeth, 13 Eliz.1, c.5 (1571)"); *In re Harbour*, 840 F.2d 1165,1172-73 & n.22 (4th Cir. 1988) (noting that historically, actions to recover fraudulent transfers were equitable proceedings); *In re Graham*, 747 F.2d 1383, 1387 (11th Cir. 1984) (holding that there is no right to a jury trial when a trustee seeks to avoid a fraudulent transfer because, "[c]ontrary to [petitioners'] assertion, . . . the English equity and law courts exercised concurrent jurisdiction over fraudulent conveyance actions") (citing *Hobbs* v. *Hull*).

added).) Damages are mentioned only in the claim for relief, which asks for judgment "avoiding the payments to the Defendants as fraudulent transfers pursuant to 11 U.S.C. § 548(a)(2), and awarding damages to the estate [in the precise amount of the fraudulent transfers] pursuant to 11 U.S.C. § 550(a)." (CPA 41.)

This Court has long refused to accept the view "that any award of monetary relief must necessarily be 'legal' relief." *Curtis* v. *Loether*, 415 U.S. at 196. And petitioners themselves concede that "[t]he obvious purpose of § 548 . . . is to allow the trustee to recover monies that are properly part of the debtor's estate." (PB 12.) This phrasing is significant: petitioners admit that the trustee seeks not to garner a damage award, but "to recover the monies transferred by [the debtor]." *Id.* Thus the trustee's complaint plainly seeks restitution. The trustee "asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs," *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946), to the estate; "[s]uch action is within the recognized power and within the highest tradition of a court of equity." *Id.*[29]

Because the fraudulent transfers which petitioners received involved money rather than something like real estate, they contend that the usual rules of bankruptcy and equity practice do not apply. But this case clearly sounds in the equitable realm of restitution because the trustee is simply asking that the very property transferred from the debtor to petitioners — money — be returned. *Cf. Bowen* v. *Massachusetts*, 108 S.Ct. 2730, 2731-36 (1988) (an order to return specific monies is equitable relief distinct from an award of damages at law).[30]

[29] *See also Tull*, 107 S.Ct. at 1839 (noting that "an action for disgorgement of improper profits [is] traditionally considered an equitable remedy, . . . a remedy only for restitution, . . . a restoration of the status quo.") (citing *Porter* with approval); *Curtis*, 415 U.S. at 197 (distinguishing the award of compensatory damages from relief "requiring the defendant to disgorge funds wrongfully withheld from the plaintiff"; the latter is an "integral part of an equitable remedy, a form of restitution").

[30] This disposes of petitioners' argument that the trustee seeks to transform a legal claim into an equitable one by artistic use of the word "avoidance," a term used in § 548 (PB 19-21). The trustee's argument is not premised on this language in § 548, but rather on the fact that he sought the return of the specific thing of value fraudulently transferred. Such return would be restitution, which has always been an equitable form of relief.

If petitioner Medex still had in its possession the two cashier's checks it received, or if petitioner Granfinanciera had left undisturbed the money that was put into its account by wire transfer, the trustee would have been perfectly satisfied with an order of restitution requiring petitioners to return the checks and void the money transfer. This exact form of relief proved inadequate because the checks were cashed and the wire transfer was intermingled with other funds or withdrawn. But because money is entirely fungible property, with each dollar legally identical to every other,[31] petitioners could not circumvent the trustee's request for equitable relief. The simple order of the bankruptcy judge, that "the trustee shall recover from [the petitioners] the sum of" $1.68 million (CPA 32), was sufficient to restore to the trustee the very property that was fraudulently transferred; there was no need to find those specific checks or wired funds to give full equitable relief.[32] The suggestion that the trustee received "money damages" simply because the form of property he recovered from petitioners is also the kind awarded to a plaintiff who proves, say, physical injury caused by another's tortious conduct, is simplistic. As this Court has noted, bankruptcy law does not ordinarily distinguish between money and other forms of property, even with regard to the recovery of improper transfers.[33] And the

[31] Under federal law, United States currency is defined as inherently fungible, whatever its form. "United States coins and currency . . . are legal tender for all debts," 31 U.S.C. § 5103, and are exchangeable "dollar for dollar, for other coins and currencies," 31 C.F.R. § 100.3 (1987). Electronic fund transfers are specifically recognized as a fungible form of money, *see* 15 U.S.C. §§ 1693, 1693a(6) (Electronic Fund Transfer Act), as are certified checks, *see* 12 U.S.C. § 501.

[32] *See, e.g., In re Wencl*, 71 B.R. 879, 883-84 & n. 2 (Bkrtcy.D.Minn. 1987) (the contrary rule "leads to strained and indefensible results"); *Matter of Reda, Inc.*, 60 B.R. 178, 181 (Bkrtcy.N.D.Ill. 1986) ("The fact that the debtor seeks to recover money in this preference proceeding does not change the nature of the action to one for a legal remedy. The debtor is not really seeking damages for an injury. [He] . . . is seeking to recover a sum of money improperly paid"); *In re Energy Resources Co.*, 49 B.R. 278, 282 (Bkrtcy.D.Mass. 1985) ("where a plaintiff seeks to recover monies wrongfully withheld, the basis for such an action is wholly equitable").

[33] "We are not unaware that a distinction between money and other property is sometimes made, but it would be anomalous in the extreme that in a statute which is concerned with the obligations of debtors and the prevention of preferences to creditors, the readiest and most potent instrumentality to give

very reason that a tort plaintiff is awarded *money* as damages, as opposed to specific items or services of value, is precisely that money *is* the most universal and fungible form of property.[34]

Even if the money the trustee received *could* be regarded as "legal damages" for some injury, on the theory that the specific checks and the money transfer involved could not be returned, that situation existed only because of the unilateral actions of petitioners in defeating the equitable relief sought. But the trustee's claim for restitution of fraudulently transferred property cannot be deemed an action "at law" simply because the trustee prudently anticipated the acts petitioners might take in an effort to evade his equitable claim for relief.

The secondary request for money damages was therefore a mere precaution to ensure that the trustee's *equitable* right to restitution of the money was not defeated by either the normal actions of petitioners in using or moving the money, or their active attempt to hide it. Where "the equitable jurisdiction of the court has properly been invoked . . . the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." *Porter*, 328 U.S. at 399.[35] Thus, the claim for money damages was not essential to

a preference should have been omitted. Money is certainly property, whether we regard any of its forms or any of its theories. . . . It would be very strange indeed if such forms of property, with all their sanctions and powers, should be excluded from the statute, and the representatives of private debts which we denominate by the general term 'securities' should be included." *Pirie* v. *Chicago Title and Trust Co.*, 182 U.S. 438, 443-44 (1901).

[34] Of course, one can imagine situations in which a transfer of money would lead to a secondary claim of legal damages. For example, if the debtor had transferred to petitioners money that was in some way unique — for example, a $5 bill that contained a rare misprint, and was therefore worth $1000 on the collectors' market, or a $5 check containing the rare endorsement of a famous person, and therefore also worth $1000 — and that money had been secreted or destroyed, a judgment for $1000 to restore the value of that five dollars of currency *would* be legal damages.

[35] *See also Tull*, 107 S.Ct. at 1839 (citing *Porter* with approval); *Mitchell* v. *DeMario Jewelry*, 361 U.S. 288, 290-92 (1960) (citing *Porter* with approval); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) (Seventh Amendment "has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law"); *Atlas Roofing*, 430 U.S. at 453 & n.10 (quoting *Jones & Laughlin* with approval).

the cause of action; the court could have awarded such relief on its own motion.[36] The Seventh Amendment should not be read to give those who receive fraudulent transfers an incentive to mingle or disperse funds in order that they might obtain jury trials with which to delay reorganizations and frustrate further the public policies of the bankruptcy laws.

Petitioners argue that *Schoenthal* v. *Irving Trust Co.*, 287 U.S. 92 (1932), dictates the conclusion that a money judgment for the amount of a fraudulent preference requires a jury trial (PB 21-22). They are mistaken. The actual holding of the brisk, four-page opinion in that case is much narrower, because it turns on the fact that, under the 1898 Bankruptcy Act, "[s]uits to recover preferences constitute[d] no part of the proceedings in bankruptcy" and the trustee was required by statute to resort to a court of general jurisdiction to bring such a suit. *Schoenthal*, 287 U.S. at 94-95. Therefore, the principle that a bankruptcy tribunal itself is a court of equitable jurisdiction was not implicated:

> *Schoenthal* went no further than to hold that a preferential transfer action under the 1898 Act must be tried in a

[36] Petitioners contend that jury rights cannot be abridged merely by classifying a "legal remedy" as "incidental" to an equitable "remedy." (PB 21.) But the cases on which petitioners rely dealt with a very different scenario: an attempt to characterize a "legal *claim* as 'incidental' to the equitable relief sought." *Curtis* v. *Loether*, 415 U.S. at 196 n.11 (emphasis added). The plaintiff in *Curtis* sought compensatory and punitive damages and an injunction on her claim of racial discrimination, which the Court deemed a legal action in tort. *Id.* at 195. And the plaintiff in *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 470, 473 (1962), alleged a breach of a trademark licensing agreement. Those obviously legal issues had to be resolved in *addressing* the respective plaintiffs' claims for equitable relief. Here, by contrast, the trustee presented a request for monetary damages not as a separate claim, but as a mere *alternative* remedy to restitution. "*Dairy Queen* implies that a fraudulent conveyance claim, stripped of any underlying legal claim, would be properly tried to the court. 369 U.S. at 471." *Whitlock* v. *Hause*, 694 F.2d 861, 865 (1st Cir. 1982). The trustee here asserts a power, conferred on him by the Bankruptcy Code, to avoid fraudulent transfers. "If there was an 'underlying' claim at all, it arose from the debtor's adjudication as a bankrupt — a proceeding that courts have invariably characterized as equitable. Thus, the *Dairy Queen* Court's concern that Seventh Amendment rights will be eroded is not present here; the trustee's avoidance powers do not further some underlying legal claim, but rather are ancillary to a determination that was itself equitable, not legal, in character." *Id.* at 864.

> non-bankruptcy forum and that its characterization as being either legal or equitable in the Seventh Amendment context must, therefore, be determined independently of the bankruptcy proceeding — *i.e.*, its legal or equitable nature must be judged as if it were a unitary common law action to avoid a transfer without any connection to a bankruptcy proceeding.

In re Harbour, 840 F.2d at 1175-76. The statutory proposition on which the *Schoenthal* decision rested — that preference actions "constitute no part of the proceedings in bankruptcy" — has been reversed by the 1984 Amendments. Under present law, actions against third parties to recover preferential or fraudulent transfers are core matters to be determined by the bankruptcy judge, who — it is undisputed — exercises the traditionally equitable powers of a bankruptcy tribunal. The *Schoenthal* analysis is therefore inapplicable to this case.[37]

[37] In any event, petitioners err insofar as they read *Schoenthal* as "dispositive" of the question of whether "a money judgment for the amount of the fraudulent transfer is actually an equitable remedy" or instead a "money judgment requiring a jury trial." (PB 21.) The *Schoenthal* Court carefully avoided any such absolute classification. The availability of equity jurisdiction could only be resolved case-by-case: "The question whether remedy must be by action at law or may be pursued in equity . . . depends upon the facts stated in the bill." 287 U.S. at 95. The principal cases cited in *Schoenthal* indicated that the boundaries of equity jurisdiction did not turn on whether relief was monetary or not, but upon other features of a given case — for example, the prospect of multiple actions, *see Boyce's Executors* v. *Grundy*, 28 U.S. (3 Pet.) 210, 215 (1830); an inability to proceed absent discovery, *compare Buzard* v. *Houston*, 119 U.S. 347, 354 (1886), *with Kennedy* v. *Creswell*, 101 U.S. 641, 645-46 (1879); or a need for an accounting, *see United States* v. *Bitter Root Co.*, 200 U.S. 451, 478-79 (1906). Notably, in *Schoenthal* itself the trustee made no effort to invoke any of these traditional grounds of equity jurisdiction (perhaps because bankruptcy procedures themselves solved multiple suit, discovery, or accounting problems). *See* 287 U.S. at 95. As a result, this Court was not required to assess the adequacy of legal remedies.

Schoenthal thus cannot be separated from the jurisdictional matrix within which it arose. The result in *Schoenthal* is not the product of an analysis of remedy per se, of the sort this Court would undertake today. The key instead was the role of equity courts as alternatives to procedurally constrained courts of law, an artifact of legal practice prior to the merger of law and equity and the adoption of the Federal Rules of Civil Procedure in 1938. In urging *Schoenthal* as controlling precedent, petitioners thus practice anachronism.

Petitioners' continued reliance on *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962), is likewise misplaced (PB 21-22). As this Court wrote in *Katchen* v. *Landy*, the prospect that parties holding improper transfers could disrupt and delay bankruptcy proceedings by demanding jury trials "is not consistent with the equitable purposes of the Bankruptcy Act nor with the rule of . . . *Dairy Queen*, which is itself an equitable doctrine. . . . *Dairy Queen* [did not] involve[] a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury." 382 U.S. at 339. In contrast, this case involves just such a statutory scheme, embodied in the 1978 Act and 1984 Amendments passed half a century after *Schoenthal*. *See supra* note 36.

The broad congressional grant to bankruptcy judges of power to

> entertain actions aimed at resolving disputes between a trustee and an adverse third party resulted, in large measure, from the deleterious effect of disputes over whether a particular issue was subject to summary or plenary jurisdiction. The summary/plenary distinction and the judicial quagmires resulting from the disputes it generated were the by-products of the 1898 Act rule that third-party claims were to be tried independently of the bankruptcy forum. Congress, after studying this problem for almost ten years, dramatically altered bankruptcy proceedings in the 1978 Act to correct these deficiencies.

In re Harbour, 840 F.2d at 1177.[38]

Contemporary bankruptcy courts, unlike their historical predecessors here and in England, are as much concerned with pursuing public interests as with adjudicating private rights. *See* Part III, *supra*. This difference further confirms the power of the bankruptcy court to grant the equitable relief that the trustee seeks. For when "the public interest is involved in a proceeding of this nature, those equitable powers assume an

[38] *See also* Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 Harv.J. on Legis. 1, 7-12 (1985).

even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328 U.S. at 398. The regime which prevailed in England in the 18th century and in this country when *Schoenthal* was decided (and when Professor Glenn wrote the treatise on which petitioners rely [39]) sometimes required a trustee (or his equivalent) to obtain assets in one system and to distribute assets in another. In the acquisition court, which might be a law court of general jurisdiction, the trustee was simply the agent of the creditors or the debtor, and as such merely an individual plaintiff. But even in 18th-century England, the very cases petitioners cite show that one could go to equity to recover a debtor's pilfered assets. *See supra* pp. 37-38.

Modern bankruptcy practice in core matters builds on that option to unify the process in a single proceeding: assets are acquired and distributed, corporations are reorganized, and important public policies are implemented, all within the jurisdiction of a single, equitable tribunal. Petitioners miss all of this. It would seem that even the 18th-century candles by which they study bankruptcy law shed more light than petitioners have chosen to see. Petitioners would prefer that they — and this Court — be left in the dark with respect to the implications of this history for contemporary congressional bankruptcy policy and with respect to the Court's modern bankruptcy and Seventh Amendment jurisprudence.

V. THE JUDGMENT BELOW WAS IN ANY EVENT CORRECT AS TO GRANFINANCIERA, BECAUSE WHEN ITS JURY DEMAND WAS DENIED IT WAS THE INSTRUMENTALITY OF A FOREIGN SOVEREIGN AND THE SEVENTH AMENDMENT THEREFORE COULD GRANT NO JURY TRIAL.

An entirely separate ground for upholding the judgment against petitioner Granfinanciera is that its status as the instrumentality of a foreign sovereign precluded any finding of a jury

[39] *See* PB 13, 17, 19 (citing 1 G. Glenn, *Fraudulent Conveyances and Preferences* (rev. ed. 1940)).

right under the Seventh Amendment. Granfinanciera was served with respondent's complaint on December 26, 1985. It was nationalized by the Government of Colombia on January 10, 1986. It demanded a jury trial in its answer to the complaint, filed February 19, 1986 (JA 7). It repeated that demand before the bankruptcy judge on February 20, 1986, after which the bankruptcy judge denied a jury trial (CPA 34). The answer referred to Granfinanciera's status as a foreign instrumentality in its suggestion of immunity from suit (Fifth Affirmative Defense (JA 5-6)). Under these circumstances the bankruptcy judge would have been entirely correct to deny the Seventh Amendment claim to a jury based simply on Granfinanciera's status as a foreign instrumentality.[40]

Even assuming that Granfinanciera, as the instrumentality of a foreign sovereign not bound by our Constitution, can claim *any* rights under that Constitution,[41] the Seventh Amendment has no relevance in this context. For the Seventh Amendment preserved only those jury rights recognized in suits at common law in 1791. But suits against foreign sovereigns or their instrumentalities at that time, whatever their legal or equitable character, were entirely unknown to the common law.

[40] It is irrelevant that Granfinanciera was not a foreign instrumentality at the time it received the fraudulent transfer, or at the time it was served with the complaint, for its constitutional objection to what occurred below is that the bankruptcy judge denied its jury claim. Therefore, only the status of Granfinanciera on February 20, 1986, is relevant. In considering claims of sovereign immunity made by foreign instrumentalities, the circuit courts have routinely ignored the fact that the instrumentality was in private hands at the time of some or all of the underlying events, *see, e.g., Riedel* v. *Bancan, S.A.*, 792 F.2d 587, 588-89 (6th Cir. 1986), and even that it was in private hands when suit was filed, *see, e.g., Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1106-07 (5th Cir. 1985); *Wolf* v. *Banco Nacional de Mexico, S.A.*, 739 F.2d 1458, 1460 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985). The sole case cited in the Eleventh Circuit's opinion below (CPA 12) suggesting the opposite in concluding that the Foreign Sovereign Immunities Act does not apply, is on its own terms irrelevant because it *applied* immunity principles to a case where the defendant had been a foreign instrumentality when the alleged wrong occurred and when suit was filed.

[41] Because a "foreign state lies outside the structure of the Union," *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 330 (1934), it is doubtful that such a state may invoke the United States Constitution. *See* Damrosch, *Foreign States and the Constitution*, 73 Va.L.Rev. 483, 519-34 (1987).

Under international law as respected in all civilized nations at common law, foreign sovereigns and their instrumentalities were accorded absolute immunity from suit.[42] As Judge Friendly observed in his exhaustive opinion on the issue in *Ruggiero* v. *Compania Peruana de Vapores*, 639 F.2d 872, 878-81 (2d Cir. 1981), in such suits, arguments under the Seventh Amendment about whether a particular *claim* has an analog at common law are irrelevant, because "the bar to a suit at common law was that the defendant, by virtue of its character as a sovereign, was not suable at all." *Id.* at 881. *See also Goar* v. *Compania Peruana de Vapores*, 688 F.2d 417, 426 (5th Cir. 1982) (per Wisdom, J.) (concluding that "[n]o principle of common law, ancient or modern, ever allowed actions against foreign sovereigns or their instrumentalities," and that therefore the Seventh Amendment "does not require a jury in a suit against a corporation owned by a foreign sovereign"). The four circuits that have subsequently examined the issue have all agreed with Judge Friendly.[43]

This practice held in the United States until the 1940's, when the Executive Branch altered it to allow suit in cases where the State Department gave advance approval on a discretionary basis. In 1976, to remove the effect of political influence and to standardize this process, Congress passed the Foreign Sovereign Immunities Act ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891, codified at 28 U.S.C. §§ 1330, 1602-11,

[42] As Chief Justice Marshall explained for a unanimous Court in *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 136-37 (1812), in rejecting an attempt by American citizens to attach a French military vessel which they claimed had been taken from them on the high seas on Napoleon's orders, all sovereigns possessed "equal rights and equal independence" and could go about their affairs "in the confidence that the immunities belonging to [their] independent sovereign station, though not expressly stipulated, are reserved by implication." *The Schooner Exchange* was reaffirmed, and the application of this principle to the commercial instrumentalities of a foreign sovereign made clear in another unanimous opinion, in *Berizzi Brothers Co.* v. *S.S. Pesaro*, 271 U.S. 562, 571-74 (1926), holding that a commercial shipping service operated by the Government of Italy was equally beyond suit at common law.

[43] *Arango* v. *Guzman Travel Advisors*, 761 F.2d 1527, 1534-35 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985); *Goar*, *supra*, 688 F.2d at 423-28; *Rex* v. *Cia. Peruana De Vapores, S. A.*, 660 F.2d 61, 62-69 (3d Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *Williams* v. *Shipping Corporation of India*, 653 F.2d 875, 881-83 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

to allow suit, in limited cases, against foreign sovereigns. *See Goar*, *supra*, 688 F.2d at 426-27; *Ruggiero*, 639 F.2d at 878-79.[44] Thus in no sense did respondent's suit against Granfinanciera become permissible through some evolution of the common law that might seem relevant to Seventh Amendment jury rights; it is "clear that suits against commercial entities controlled by foreign sovereigns have been allowed only within the last half-century, and only by operation of executive or legislative policy." *Goar*, *supra*, 688 F.2d at 426. And the FSIA, by 28 U.S.C. § 1330's requirement of a "nonjury civil action" where foreign states are involved, indeed "*prohibit[s]* a case brought against a foreign state . . . from being tried before a jury."[45]

[44] In its opinion below, the Eleventh Circuit denied Granfinanciera's claim of immunity under the FSIA (CPA 12), and Granfinanciera did not seek review on that point.

[45] *Arango*, *supra*, 761 F.2d at 1532 (emphasis added). *See also Goar*, *supra*, 688 F.2d 417, 420-21 (explaining that "Congress determined that '[a]ctions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved' ") (quoting H.R. Rep. No. 1487, 96th Cong., 2d Sess. 13); *Rex*, *supra*, 660 F.2d at 65 (observing that "[t]he intention of Congress to withhold jury trial from actions against foreign states . . . [is] clear"); *Ruggiero*, *supra*, 653 F.2d at 875 (noting that "no jury can be had in an action in federal court against a foreign state").

Because this argument simply provides an alternative basis to support the judgment entered below against Granfinanciera, it could not have been presented by respondent on a cross-petition for certiorari. But it is proper at this point to call it to the Court's attention, since the Court may wish to dismiss certiorari as improvidently granted with respect to Granfinanciera, rather than to affirm the judgment as to that petitioner. The issues addressed in Parts I through IV, *supra*, obviously remain with respect to petitioner Medex.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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PETITIONER'S

BRIEF

Supreme Court, U.S.
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CLERK

No. 87-1716

In The

Supreme Court of the United States

October Term, 1987

GRANFINANCIERA, S.A., a Colombian corporation, and MEDEX, LTDA., a Latin American corporation,

Petitioners,

vs.

PAUL C. NORDBERG, Creditor Trustee for the Estate of Chase & Sanborn Corporation, f/k/a General Coffee Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED*

Chase & Sanborn filed a Chapter 11 petition in bankruptcy. Trustee Nordberg sued petitioners to recover allegedly fraudulent cash transfers made to petitioners by the debtor before bankruptcy. The relief sought by the trustee, and awarded by the court, was a judgment for the amount of the transfers. Petitioners requested but were denied a trial by jury.

The questions presented are:

1. Did petitioners have a Seventh Amendment right to a jury trial of the fraudulent transfer action where the only relief the trustee requested was money damages?

2. Could Congress' designation of the trustee's fraudulent transfer action as a bankruptcy "core" proceeding, under 28 U.S.C. § 157(b)(2) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, abrogate petitioners' Seventh Amendment right to a jury trial of that otherwise traditionally legal cause of action?

3. Does the repeal of 28 U.S.C. § 1480, and the enactment of 28 U.S.C. § 1411, by the Bankruptcy Amendments and Federal Judgeship Act of 1984, providing for jury trials in certain bankruptcy matters, abrogate the petitioners' Seventh Amendment right to a jury trial?

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* Petitioners reallege and incorporate by reference the Rule 28.1 List appearing on p. ii of their petition for certiorari.

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OPINIONS AND JUDGMENTS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 835 F.2d 1341 and appears in the appendix to the petition for certiorari at pp. 1-17. The judgment and opinion of the bankruptcy court (Pet. Cert. App. 24-32) and the decision of the district court affirming the bankruptcy court (Pet. Cert. App. 18-23) were not officially reported.

JURISDICTION OF THIS COURT

Jurisdiction of this Court is based on 28 U.S.C. § 1254(1). The decision of the Eleventh Circuit Court of Appeals was rendered January 19, 1988. The petition for certiorari was timely filed within 90 days thereof, on April 18, 1988, pursuant to 28 U.S.C. § 2101(c).

CONSTITUTION AND STATUTES

Seventh Amendment, United States Constitution	(Pet. Cert. 3)
28 U.S.C. § 157	(Pet. Cert. App. 42)
28 U.S.C. § 1411	(Pet. Cert. App. 45)
11 U.S.C. § 548	(Pet. Cert. App. 45)
11 U.S.C. § 550	(Pet. Cert. App. 47)
28 U.S.C. § 1334	(Appendix to Brief)

STATEMENT OF THE CASE

The debtor, Chase & Sanborn Corporation, filed a petition for reorganization under Chapter 11 of the 1978 Bankruptcy Act on May 18, 1983. (Pet.Cert.App. 37). On May 17, 1985, respondent, Paul C. Nordberg, creditor trustee for the debtor, filed a complaint against petitioners Granfinanciera, S.A. and Medex, Ltda., in the United States District Court for the Southern District of Florida, to recover certain fraudulent transfers under 11 U.S.C. §§ 548(a)(1) and (2), and 550. The complaint was filed in district court rather than in bankruptcy court because, according to the trustee's assertion in paragraph one of his complaint, "recent precedent suggests that transfer avoidance actions may only be heard and decided by judges serving pursuant to Article III of the United States Constitution, *i.e.*, federal district court judges." (Pet.Cert.App. 37).

In Count I of his complaint the trustee alleged that on October 20, 1982, December 15, 1982, and December 16, 1982, the debtor (a term which included its predecessor in interest, General Coffee Corporation, collectively referred to in the complaint as "C&S"), transferred $1,700,000 from its New York and Miami, Florida, bank accounts into Granfinanciera's and Medex's Miami bank accounts. These transfers were constructively fraudulent under § 548(a)(2), because, among other reasons, the debtor had received no consideration or reasonably equivalent value from Granfinanciera and Medex in return. Count II incorporated these allegations and further alleged that the transfers were actually fraudulent under § 548(a)(1) since they were made by the debtor "with the actual intent to

hinder, delay and defraud the other creditors of C&S." (Pet.Cert.App. 39-40;45-46).

The trustee's complaint demanded judgment against Granfinanciera and Medex, jointly and severally, as follows:

> (i) As to Count I, avoiding the payments to the Defendants as fraudulent transfers pursuant to 11 U.S.C. § 548(a)(2), and awarding damages to the estate of C&S in an amount of not less than $1,700,000 pursuant to 11 U.S.C. § 550(a);
> (ii) As to Count II, avoiding the payments to the Defendants as fraudulent transfers pursuant to 11 U.S.C. § 548(a)(i) [sic], and awarding damages to the estate of C&S in an amount not less than $1,700,000 pursuant to 11 U.S.C. § 550(a);
> (iii) Awarding the estate of C&S the costs and expenses of this action; and
> (iv) Granting the estate of C&S such other and further relief as is just and proper, such as interest from the date of each transfer complained of herein.

(Pet.Cert.App. 41).

On July 12, 1985, the United States District Court for the Southern District of Florida referred all proceedings on the trustee's complaint to the bankruptcy court. (J.A. 1). Granfinanciera and Medex filed their answer in bankruptcy court on February 19, 1986. (J.A. 2-7).

Granfinanciera and Medex answered each paragraph of the complaint with a denial or an assertion of lack of knowledge. Their affirmative defenses included allegations that they "acted as a mere conduit for the transfer of funds by General Coffee Corp. to other entities, and as such . . . never received any benefit from this transaction and are therefore not liable under Section 548 of the

Bankruptcy Code" (J.A. 5); and that they came within the exception to liability contained in § 548(c) for good faith transfers for value. (J.A. 6-7). Granfinanciera and Medex concluded their answer with the sentence: "Further, Defendants demand trial by jury on all issues so triable." (J.A. 7). The trial judge denied the petitioners' request for a jury trial stating that there were no "triable jury issues" in a fraudulent transfer action and that such an action "under the English common law, as I understand it, was a non-jury issue." (Pet.Cert.App. 34-35).

The proofs at trial showed that Granfinanciera and Medex were Columbia, South America-based banking and lending institutions (T.(2/20)-121 to 122)[1] which maintained correspondent relationships with several banks in the United States, including Banco Real, a Brazilian bank with offices in New York and Miami, Florida. (T.(4/10)-99). On October 20, 1982, General Coffee wired directions to Banque Worms, in New York, at which it maintained an account, to transfer $1,500,000 to Morgan Guaranty in New York, to credit the account of Banco Real, in New York, to further credit the account of Granfinanciera at Banco Real in Miami. Granfinanciera stipulated that these funds were received in its account. (T.(2/20)-72 to 73). Medex similarly stipulated that two

[1] The record before the circuit court consisted of three volumes of pleadings and other filed documents, and numerous loose and unindexed depositions that were admitted in lieu of live testimony, trial transcripts, and documentary trial exhibits. Trial transcripts will be cited by a "T" followed by the month and day in 1986, in parentheses.

cashier's checks, one for $100,000, dated December 15, 1982, and the other for $80,000, dated December 16, 1982, drawn on General Coffee's Royal Trust Bank account in Miami, were credited to Medex's separate account at Banco Real, Miami. (T.(2/20)-65 to 69; 72-73).

Granfinanciera sought to prove that the $1,500,000 it received from General Coffee, through Banque Worms, was actually the repayment of a loan it had made to another Colombian corporation, Voluntad Editores, Ltda. (T.(4/10)-15;23;24;27;31-33;37-45;48;53-54;93-96); and that the transfer was part of a complicated course of dealings between General Coffee, Voluntad, another Colombian corporation named Luis A. Duque Pena y Hijos, Ltda., and itself in which it acted as a mere conduit for the transferred funds and in which General Coffee received value from Duque Pena. (T.(4/10)-38 to 41;78 to 96).

The bankruptcy judge found that Granfinanciera had not acted as a mere conduit of funds, but had materially benefited from the transfer, and that no consideration had flowed from Granfinanciera or from any third party to General Coffee with respect to the transfer. (Pet.Cert.App. 28-29). Satisfied that the elements of a constructively fraudulent transfer had been established, and that Granfinanciera and Medex had not proved their defenses, the judge awarded the trustee $1,500,000 against Granfinanciera, $180,000 against Medex, and dismissed the actual fraud count with prejudice. (Pet.Cert.App. 24-30). The relief granted in the judgment provided, in its entirety:

> Accordingly, it is Ordered that count 2 of the complaint [alleging actual fraud under § 548(a)(1)] is

> dismissed with prejudice. It is further ordered that (1) the trustee shall recover from the defendant Granfinanciera the sum of $1.5 million and (2) the trustee shall recover from the defendant Medex the sum of $180,000. Costs shall be taxed on motion.

(Pet.Cert.App. 32). The monetary relief granted was thus less than the $1,700,000 and prejudgment interest that the trustee had demanded against each defendant jointly and severally.

Granfinanciera and Medex briefed the issue of their right to jury trial in their appeal to the district court. (R. 1-10;13). The district court, however, chose not to discuss that issue in affirming the judgment of the bankruptcy court. (Pet.Cert.App. 18-23).

The Eleventh Circuit Court of Appeals addressed the question, but concluded that Granfinanciera and Medex had no right to a jury trial. (Pet.Cert.App. 1; 13-17). The circuit court began its analysis by observing that the right to jury trial must arise either from the Seventh Amendment or from the statute which authorized the trustee's suit. The fraudulent transfer statute, 11 U.S.C. § 548, did not provide for a jury trial and although 28 U.S.C. § 1480, as part of the Bankruptcy Reform Act of 1978 did, that section was repealed by the enactment of 28 U.S.C. § 1411 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, on July 10, 1984. Because § 1411, by the terms of the 1984 Act did not apply to bankruptcy cases, such as the present one, that were pending on July 10, 1984, no statutory authority existed for a jury trial in bankruptcy. (Pet.Cert.App. 13-14).

The Seventh Amendment did not provide a right of jury trial, the court continued, because jury trials are

simply not required in equitable actions to recover fraudulent conveyances. The fact that the bankruptcy court granted monetary relief did not change the equitable nature of the cause of action since monetary relief may flow from an equitable claim without converting the claim into a legal cause of action. (Pet.Cert.App. 14-15).

The circuit court further reasoned that because bankruptcy court jurisdiction is inherently equitable, and actions to avoid fraudulent transfers are "core" proceedings under the 1984 Act, core proceedings, as creations of the bankruptcy law, must also be inherently equitable in nature. Alternatively, citing *Katchen v. Landy*, 382 U.S. 323 (1966), the circuit court claimed that by categorizing the cause of action to avoid a fraudulent conveyance as a core proceeding, Congress, under its bankruptcy power, could convert a legal cause of action into an equitable one and thus displace a litigant's Seventh Amendment right to jury trial. (Pet.Cert.App. 15-16). The circuit court also justified the absence of jury trials in bankruptcy by the need for expeditious proceedings in that court. Jury trials, the circuit court believed, would dismember the statutory scheme of the bankruptcy laws. (Pet.Cert.App. 16-17).

Granfinanciera and Medex filed a petition for certiorari in this Court on April 18, 1988, to review the decision of the circuit court. Certiorari was granted on June 13, 1988.

SUMMARY OF ARGUMENT

Point I

The Seventh Amendment preserves the right of jury trial in statutory proceedings asserting legal rights and seeking legal remedies that are analogous to common law causes of action tried to a jury in 18th-century England. The bankruptcy trustee's fraudulent transfer suit under 11 U.S.C. § 548 of the 1984 Bankruptcy Act is analogous to an 18th-century English common law action by a bankruptcy assignee to recover a fraudulent preference or conveyance. Where the bankruptcy assignee sought a money judgment, as the trustee does here, his action would sound in trover, assumpsit, or debt and would be tried to a jury.

The trustee's demand for purely monetary relief did not lose its historically legal character by being joined with a request that the monetary transfers also be 'avoided.' *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932) held that a trustee's suit to recover, and thus implicitly avoid, a monetary preference, merely demanded a legal remedy that must be tried to a jury. Furthermore, where money has been fraudulently transferred, 'avoidance' is not even a remedy but is simply a term that defines the statutory prerequisites to recovery, including the very act of choosing to file suit, that the trustee must satisfy before he obtains a money judgment.

Point II

A bankruptcy tribunal is not a specialized court of equity or even a separate tribunal under 28 U.S.C. §§ 151,

157 and 1334 of the 1984 Act, but consists of bankruptcy judges sitting as a "unit" of the district court. The grant of original and exclusive jurisdiction to the district court, original but not exclusive jurisdiction to the bankruptcy judges, and the provision that a district court "may" share its exclusive bankruptcy jurisdiction with the bankruptcy judges by referring cases to them, vests the bankruptcy judges with whatever limited legal and equitable jurisdiction they need to determine the cases referred. Just as traditionally legal causes of action do not lose their identity in district court by virtue of the merger of law and equity, they do not lose their identity by being labeled "core" proceedings in 28 U.S.C. § 157 and being assigned to a jurisdictionally indivisible "unit" of the district court.

Even if the bankruptcy judges are considered a type of equitable or legislative tribunal, Congress could not extinguish the petitioners' Seventh Amendment rights by entrusting trials of historically legal rights and remedies to that tribunal. *Ross v. Bernhard*, 396 U.S. 531 (1970). *Katchen v. Landy*, 382 U.S. at 336, citing *Schoenthal*, applies this concept in a bankruptcy context by reaffirming a defendant's right to jury trial in a preference action, providing the defendant has not itself invoked the jurisdiction of the bankruptcy court by filing a claim, as is the case here.

Congress, in any event, never intended to abrogate the right to jury trial in traditionally legal causes of action. The 1898 and 1978 Bankruptcy Acts and interpretative case law clearly preserved the right of jury trial

in actions like the present one where a trustee seeks a money judgment in an action to recover a preference or fraudulent transfer. Under the 1898 Act, such suits were called "plenary" and were tried to a jury on the law side of district court. In 28 U.S.C. § 1480 of the 1978 Act, Congress preserved the requirement of jury trials for "plenary"-type actions while assigning jurisdiction over them to the bankruptcy court. A majority of courts interpreting the 1978 Act allowed jury trials in actions like the present one either on the grounds that a "plenary" suit for a money judgment is essentially an action at law, or by following a traditional Seventh Amendment analysis.

The 1984 Act impliedly repealed the jury trial provisions of the 1978 Act but made its new and highly ambiguous jury trial provision, 28 U.S.C. § 1411, inapplicable to cases, like the present one, filed before July 10, 1984. Nevertheless, the legislative history of § 1411 is instructive as it reflects the continuing sense of Congress that the right to jury trial under traditional bankruptcy law should be preserved. The ambiguities in § 1411, which leave unclear whether Congress intended to restrict jury trials in bankruptcy to personal injury and wrongful death cases, can easily be resolved in favor of jury trials in all traditional "plenary"-type or legal causes of action when read against the legislative history of that provision.

ARGUMENT

POINT I

A BANKRUPTCY TRUSTEE'S SUIT TO RECOVER MONIES FRAUDULENTLY TRANSFERRED WAS HISTORICALLY AN ACTION AT LAW FOR WHICH THE RIGHT OF JURY TRIAL IS PRESERVED UNDER THE SEVENTH AMENDMENT.

The Seventh Amendment provides that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." Statutory causes of action must be tried to a jury if they are "analogous" to "Suits at common law." *Tull v. United States*, 107 S.Ct. 1831, 1835 (1987).

To determine whether a contemporary statutory cause of action is analogous to a suit at common law, the cause of action must first be compared "to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity" – an analysis the court below neglected completely to perform – and next the relief sought must be examined to "determine whether it is legal or equitable in nature." *Tull, id.* Of the two steps, "characterizing the relief sought is '[m]ore important' than finding a precisely analogous common law cause of action. . . . *Curtis v. Loether*, 415 U.S. at 196, 94 S.Ct. at 1009." *Tull*, 107 S.Ct. at 1837. *See also Pernell v. Southall Realty*, 416 U.S. 363, 375-376 (1974) (The Seventh Amendment requires trial by jury in all suits involving "rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty").

A. Suits to recover fraudulently transferred goods and monies were tried at law under 18th-century English bankruptcy practice.

The trustee sued Granfinanciera and Medex under the fraudulent transfer provisions of the 1984 Act, 11 U.S.C. § 548 (98 Stat. 378) and 11 U.S.C. § 550 (98 Stat. 379), to recover the monies transferred by General Coffee to Granfinanciera and Medex in 1982. Section 548(a)(1), pleaded in Count II of the trustee's complaint, allowed him to avoid any transfer occurring within one year prior to bankruptcy that the debtor made "with actual intent to hinder, delay, or defraud" his creditors. Section 548(a)(2), alleged in Count I, allowed the trustee to avoid any transfer made within the same one-year period while the debtor was insolvent, and from which the debtor received less than a reasonably equivalent value. Section 550 provides that to the extent a transfer is avoided under § 548, the trustee may recover the property transferred or its value.

The obvious purpose of §§ 548 and 550 is to allow the trustee to recover monies that are properly part of the debtor's estate and should be ratably distributed among creditors, but which the debtor intentionally or constructively attempted to put beyond his creditors' reach. Although preferences are made to benefit a creditor, 11 U.S.C. § 547(b)(1) (98 Stat. 378), while fraudulent transfers need not be, both types of transfers by a debtor ultimately hinder, delay or defraud the debtor's creditors and thus are violative of the basic policy of non-discriminatory distribution that underlies the bankruptcy law. *Cf. Van Iderstine v. National Discount Co.*, 227 U.S. 575, 582 (1913) ("Conveyances may be fraudulent because the

debtor intends to put the property and its proceeds beyond the reach of his creditors; or because he intends to hinder and delay them as a class; or by preferring one who is favored above the others.") Given the virtually identical harms worked by both types of transfers, the jurisdictional principles that historically governed the fora in which preferences could be recovered should logically apply, in a Seventh Amendment analysis, to fraudulent conveyances as well. *See* 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 98 at 184 (rev. ed. 1940). ("[W]hat is true of a preference, which essentially is an offense against a bankruptcy law as such, is *a fortiori* true of a fraudulent conveyance. . . .").

English case law in the 18th-century characterized a preference as a type of fraudulent conveyance, and a fraud upon the bankruptcy law itself. *Alderson v. Temple*, 4 Burr. 2235, 98 Eng.Rep. 165, 167, 168 (1768) ("All acts to defraud creditors or the public laws of the land are void, and if the nature of the act be a conveyance or grant, 'tis not only void, but *an* act of bankruptcy"); *Harman v. Fishar*, 1 Cowp. 227, 98 Eng.Rep. 998, 1001 (1774) ("[N]o trader can do an act of fraud, contrary to the spirit of the bankrupt laws, and to the injury of his creditors. . . . [H]e cannot take his estate out of that management which the law puts it into"). *See, e.g., Smith v. Payne*, 6 T.R. 152, 101 Eng.Rep. 484 (1795); *Barnes v. Freeland*, 6 T.R. 80, 101 Eng.Rep. 447 (1794); *Thompson v. Freeman*, 1 T.R. 155, 99 Eng.Rep. 1026 (1786); *Rust v. Cooper*, 2 Cowp. 629, 98 Eng.Rep. 1277, 1279 (1777); *Martin v. Pewtress*, 4 Burr. 2477, 98 Eng.Rep. 299 (1769); *Compton v. Bedford*, 1 Black W. 362, 96 Eng.Rep. 202 (1762). *See also, The Case of Bankrupts*, 2 Co. Rep. 25a, 76 Eng.Rep. 441 (1584).

In each of the foregoing cases, the debtor's assignees[2] in bankruptcy sued at law in trover, with a jury, to recover preferentially transferred chattels and monies. Fraudulent preferences were also routinely recovered at law by the common law actions of assumpsit (for money had and received, or goods sold and delivered) and debt. *Smith v. Hudson*, 4 T.R. 212, 100 Eng.Rep. 979 (1791); *Vernon v. Hanson*, 2 T.R. 287, 100 Eng.Rep. 156 (1788); *Atkin v. Barwick*, 1 Strange 165, 93 Eng.Rep. 450, 451 (1774); *Hussey v. Fiddall*, 3 Salk. 59, 88 Eng.Rep. 1353 (1699).

There is no doubt that assumpsit, trover and debt were uniquely common law, not equitable causes of action. Assumpsit was the action by which contractual or quasi-contractual obligations could be enforced, or the wrongful use of monies or goods redressed by a money judgment. Assumpsit largely supplanted the former action of "debt," which was "[a]n action for a fixed sum of money due for any reason," and could be used "as a means of recovering liquidated sums." Trover was a delictual action somewhat akin to conversion. F. Maitland, The Forms of Action at Common Law 51-52; 55-58 (rep. 1971); 7. W. Holdsworth, A History of English Law 440-441 (2d ed. 1937).

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[2] Under English bankruptcy practice at the time, creditors filed a petition in Chancery. The Chancellor approved the appointment of commissioners who would oversee the appointment of assignees, chosen by the creditors, in whom all rights to the bankrupt's property, including that held by third persons, would then be vested for the benefit of the creditors. 2 W. Blackstone, Commentaries * 479-486.

The bankruptcy assignees not only sued preferred creditors at law, but sued anyone at law who had obtained or used a share of the bankrupt's estate in fraud of creditors. In *Phillips v. Hunter*, 2 H. Bl. 402, 126 Eng.Rep. 618 (1795), and *Hunter v. Potts*, 4 T.R. 182, 100 Eng.Rep. 962 (1791), certain creditors, following the debtor's bankruptcy in England, attached his monies in North America. The bankrupts' assignees sued and recovered at law for money had and received. In *Thompson v. Councell*, 1 T.R. 157, 99 Eng.Rep. 1028 (1786), the debtor, in straightened circumstances following his bankruptcy, entrusted his sister-in-law with some of his personal effects with the request that she use those goods to maintain himself and his family. The sister-in-law, who was not a creditor of her brother-in-law, borrowed money on the goods which she duly applied to the support of the debtor and his family. Since the assignees were vested with title to the transferred property from the time of bankruptcy, a recovery in trover against the sister-in-law, on a jury verdict for the value of the goods, was approved.

A jury verdict in a trover action, brought under circumstances analogous to those in an action by bankruptcy assignees, was also approved in *Cadogan v. Kennett*, 2 Cowp. 433, 98 Eng.Rep. 1171 (1776). There, the plaintiffs, trustees under the marriage settlement of Lord Montfort, sued Montfort's judgment creditor and levying sheriff's officers who had seized goods which, under the terms of the marriage settlement, had been conveyed to the trustees for the use of Montfort for life and then to the use of Montfort's wife and heirs. Montfort had transferred these goods to his trustees while he was indebted

to the defendant. Citing 13 Eliz. c. 5 (1571), the seminal statute against fraudulent conveyances, which provided "that no act whatever done to defraud a creditor or creditors shall be of any effect against such creditor or creditors," *id.* at 1172, Lord Mansfield held that there was no evidence Montfort's marriage settlement was motivated in any way by a desire to defraud his creditors and approved the jury's verdict for the trustees. In the opinion, however, Lord Mansfield reaffirmed the capacity of the common law to deal with fraudulent conveyances stating, "The principles and rules of the common law, as now universally known and understood, were so strong against fraud in every shape, that the common law would have allowed every end proposed by the statutes [of Elizabeth, against fraudulent conveyances]". *Id.* at 1172. *See also, Foley v. Burnell,* 2 Cowp. 436, 98 Eng.Rep. 1173 (1779).

Thompson v. Councell and *Cadogan v. Kennett* represent two sometimes parallel and sometimes convergent case lines in the development of the law of fraudulent conveyances in a non-preference context. *Thompson v. Councell,* as well as *Phillips v. Hunter* and *Hunter v. Potts,* reflect an already well-developed jurisdiction at law over bankruptcy assignees' suits to recover fraudulent conveyances not explicitly dependent upon 13 Eliz. c. 5, the fraudulent conveyance statute. *Cadogan v. Kennett,* on the other hand, reflects the well-accepted use at law to which 13 Eliz. c. 5 was being put – with Lord Mansfield's endorsement that the statute could not "receive too liberal a construction, or be too much extended in suppression of fraud," 98 Eng.Rep. at 1172 – in reaching fraudulent conveyances

arising in a non-bankruptcy context. Despite their independent origins in English law, and their initially independent development, these two lines of authority converged in the English Bankruptcy Act of 1603, 1. Jac. 1, c. 15, which incorporated 13 Eliz. c. 5 and made a fraudulent transfer, even to a non-creditor, an act of bankruptcy that could be recovered by the bankruptcy assignees. 1 GLENN, *supra,* at 96-99.

That equity would not entertain an action for the return of fraudulently transferred monies or goods is evidenced not only by the volume and uniformity of the foregoing legal precedent but by decisions in Chancery. In *Ex parte Scudamore,* 3 Ves. Jun. 85, 30 Eng.Rep. 907, 909 (1796), the Chancellor stated to the bankruptcy commissioners that "You are applying on behalf of the assignees desiring me to direct the money to be paid over. I do not think I can make that order. . . .Let an action be brought against Haverfield if the parties shall think proper." In *Ex parte Gayner* (1755), described in *Worsley v. Demattos,* 1 Burr. 484, 98 Eng.Rep. 1160, 1165 (1758), the debtor had preferred all his creditors but one. The Chancellor denied an application by the excluded creditor to summarily order the preferred creditors to surrender the money and personalty they had received, "as they had a right to have it tried at law." Similarly, in *Hobb v. Hull,* 1 Cox. 446, 29 Eng.Rep. 1242 (1788), the court refused to set aside an allegedly fraudulent separation agreement at the request of the husband's creditors saying that if it fell within 13 Eliz., the plaintiffs had a remedy at law, but even if it did not their possible remedies were still "at law" and not in equity.

The abundance of fraudulent conveyance and preference cases tried at law, and the equity decisions expressly declining jurisdiction over such cases, reflect a well-established jurisdiction in 18th-century English courts of law over actions to recover fraudulent transfers of money and goods, in both bankruptcy and non-bankruptcy contexts.

B. The monetary relief demanded by the trustee in this proceeding is entirely legal in nature.

In *Schoenthal v. Irving Trust Co.*, 287 U.S. at 94, a trustee under the Bankruptcy Act of 1898 (30 Stat. 544) sued in equity for an accounting and to recover preferential payments. The defendants demanded but were denied a transfer to the law side of the court and a trial by jury. This Court, citing several of the English cases on which Granfinanciera and Medex now rely, observed that "[i]n England long prior to the enactment of our first Judiciary Act, common-law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts." The English jury practice in these instances was preserved by the Seventh Amendment as expressed through Section 267 of the Judicial Code (36 Stat. 1163), which provided that "[s]uits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law." Since the facts stated in the trustee's bill and the essentially monetary relief he demanded would have afforded him an adequate remedy at law, this Court held that the defendants were entitled to a transfer to the law side of the court and a jury trial. *Schoenthal*, for the reasons expressed in the comparative

discussion of preference and fraudulent transfer (Subpoint A., *supra*), is as controlling in an action for the recovery of one form of conveyance as the other. GLENN, *supra*, at 184.

Schoenthal is also dispositive of the circuit court's position that the trustee's claim for monetary relief below was actually equitable in nature since it was inseparably connected to or flowed from his underlying equitable demand for avoidance. (Pet.Cert.App. 14-15). There is no essential difference between the trustee's avoidance power under § 60b of the 1898 Act (30 Stat. 562), addressed in *Schoenthal*, and under § 548 of the 1984 Act. In a proceeding under either section, avoidance is merely a nominal prerequisite to obtaining a judgment for the amount of a purely monetary transfer. This Court, in *Schoenthal*, properly refused to allow the trustee's demand for a decree declaring the transfers preferential, *i.e.*, avoided, to dominate its Seventh Amendment analysis. "[T]he constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-478 (1962).

Avoidance has properly been regarded as an irrelevant consideration in suits to recover monetary transfers. In *Warmath v. O'Daniel*, 159 F. 87 (6th Cir. 1908), cited approvingly in *Schoenthal*, 287 U.S. at 95 n. 3, the bankruptcy trustee, arguing against a jury trial in an action to recover the amount of a preference, had suggested that "the court must first set aside the transfer before it could proceed to judgment, and that it is the peculiar province of a court of equity to set aside unlawful transfers." *Id.* at

88. Calling this argument "an ingenuous, but unsubstantial figment" and a "devise for evading the statute forbidding a resort to a court of equity," *id.* at 88, 89, the court observed that "[n]o distinct or formal preliminary action was required or contemplated by the statute. . . .[N]or indeed is anything more required than in any ordinary action at law where the plaintiff is always bound to establish the facts which create the liability, whereupon, and without more, the court gives judgment for the sum he is entitled to recover." *Id.* at 89.

The identical argument was rejected in *Foster v. Zellman*, 24 F.2d 1002 (D.Mass. 1928), wherein the court stated that the trustee's right to recover "does not rest on any principle of equity applied exclusively in courts of chancery. It springs from legislative enactment. The Bankruptcy Act, and not the equity court, declares the transaction voidable by the trustee." Again, in *Grant v. National Bank of Auburn*, 197 F. 581, 590 (N.D.N.Y. 1912), another case approved in *Schoenthal*, 287 U.S. at 95 n. 3, the court answered the same argument by noting that "[t]he form of action is specifically authorized, and as stated, the transaction is voidable by and at the election of the trustee and not by the court. The mere demand and bringing of the action is an election to avoid the transaction." Under 11 U.S.C. § 548(a) of the 1984 Act, it is still the trustee who "may avoid" the transfer by prosecuting his action, and, under 11 U.S.C. § 550(a), recover a judgment "to the extent that [the] transfer is avoided under section . . . 548."

The courts, in short, have never considered 'avoidance' to be a remedy, either equitable or legal, in an action to recover a monetary transfer, but rather have

regarded it as a shorthand way of describing the statutory elements of an avoidable transfer that a trustee must prove in order to recover. The fiction of avoidance was tacitly recognized for what it was by the bankruptcy judge in this case, who neither in his memorandum opinion nor in his money judgment thought it necessary or relevant to decree 'avoidance' of the transfers to Granfinanciera and Medex. (Pet.Cert.App. 24-32). The trustee, of course, has never been heard to complain about this omission.

Even if 'avoidance' were to be considered an equitable remedy, and the primary relief sought by the trustee herein, the trustee's monetary claim nevertheless remains a legal one. The petitioners' right to a jury trial of this independent legal remedy cannot be lost by characterizing it as merely "incidental" to the remedy of avoidance. *Cf. Curtis v. Loether*, 415 U.S. 189, 197 n. 11 (1974); *Dairy Queen, Inc. v. Wood*, 369 U.S. at 470, 473.

Schoenthal is equally dispositive of the circuit court's assertion that a money judgment for the amount of a fraudulent transfer is actually an equitable remedy and not the type of money judgment requiring a jury trial under the Seventh Amendment. (Pet.Cert.App. 15). *Schoenthal* held that a complaint for the recovery of preferential transfers "of ascertained and definite amounts," which alleged no facts justifying equitable relief, sought a simple monetary remedy that was historically plain, adequate and complete at law. 287 U.S. at 95, 96. The money judgment sought and recovered by the trustee below is indistinguishable from the money judgment sought by the trustee in *Schoenthal* and sought by and awarded to bankruptcy assignees in 18th-century courts of law. Since the defendants in *Schoenthal* were entitled to a jury trial

on the issue of their monetary liability under the bankruptcy laws, Granfinanciera and Medex are too.

As *Schoenthal* clearly illustrates, this Court accords significant weight in a Seventh Amendment analysis to the fact that the relief the trustee seeks is purely monetary. *See also, Dairy Queen, Inc. v. Wood,* 369 U.S. at 476 ("Petitioner's contention . . . is that insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal. We agree with that contention"); *Whitehead v. Shattuck,* 138 U.S. 146, 151 (1891) ("[W]here an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law"). There is no apparent reason to depart from the *Schoenthal* analysis in this case.

POINT II

EVEN IF IT HAD INTENDED TO DO SO, WHICH IT DID NOT, CONGRESS' DESIGNATION OF THE TRUSTEE'S FRAUDULENT TRANSFER ACTION AS A BANKRUPTCY "CORE" PROCEEDING UNDER 28 U.S.C. SECTION 157(b)(2) OF THE 1984 ACT COULD NOT AND DID NOT ABROGATE GRANFINANCIERA'S AND MEDEX'S SEVENTH AMENDMENT RIGHT TO JURY TRIAL.

A. A bankruptcy court under the 1984 Act is not a specialized court of equity but a court of limited legal and equitable jurisdiction.

Although it has been loosely stated that bankruptcy courts are courts of equity, most courts shrink from characterizing bankruptcy jurisdiction as entirely and necessarily equitable. *See, e.g., Katchen v. Landy,* 382 U.S. at 327

(Bankruptcy courts are "essentially" courts of equity); *Pepper v. Litton,* 308 U.S. 295, 304 (1939) (A bankruptcy court is a court of equity "for many purposes"). It is far more accurate to say that the jurisdiction of a bankruptcy court is not inherently equitable but rather reflects the scope of its current statutory grant. In the absence of a specific congressional withdrawal of legal jurisdiction – which did not occur in the 1978 and 1984 Acts – to the extent a bankruptcy court is statutorily required to hear a traditionally legal matter, it necessarily must exercise that form of jurisdiction.

This approach was adopted in *Simpson v. Western Hardware and Metal Co.,* 227 F. 304 (W.D.Wash. 1915), where the court observed that since the 1898 Act, as amended, defined the bankruptcy court to include the district court, and extended the jurisdiction of bankruptcy courts, as thus defined, to plenary avoidance actions, bankruptcy courts "must exercise equitable or legal jurisdiction according to the nature of the actions. To determine which is the appropriate remedy, a consideration of the nature of relief sought is necessary in light of section 267 of the Judicial Code. . . ." 227 F. at 312. *Schoenthal,* too, allowed for suits to recover monetary preferences in the bankruptcy courts ("They may be brought in the state courts as well as in the bankruptcy courts"), but required that the remedy, in whatever court it was sought, still be pursued "by action at law." 287 U.S. at 95.

The 1984 Act, 28 U.S.C. § 1334(a), vests "original and exclusive" unified equitable and legal jurisdiction in the

district court over all "cases"[3] under title 11. Section 1334(b) provides that the district courts shall have "original but not exclusive jurisdiction of all civil proceedings arising under title 11," a category which includes transfer avoidance proceedings under 11 U.S.C. § 548. There is, however, no longer a separate judicial entity called a "bankruptcy court" under the 1984 Act. Section 151 of title 28 (98 Stat. 336) merely provides that the bankruptcy judges in each judicial district "shall constitute a unit of the district court to be known as the bankruptcy court." Under 28 U.S.C. § 157 (98 Stat. 340), "core proceedings", which in § 157(b)(2)(H) are defined to include "proceedings to determine, avoid, or recover fraudulent conveyances," may be referred to, heard and determined by "the bankruptcy judges" for the district. "Thus while functionally there may appear to be a separate bankruptcy court, for jurisdictional purposes there is only one court, i.e., the district court." *Firestone v. Dale Beggs & Assocs. (In re Northwest Cinema Corp.)*, 49 B.R. 479, 480 (Bankr. D. Minn. 1985); *Neill v. Borreson (In re John Peterson Motors, Inc.)*, 56 B.R. 588, 590 (Bankr. D. Minn. 1986) ("The proper focus on a motion to dismiss for lack of subject matter jurisdiction must be on the district court because this court is not jurisdictionally a separate court"); *Huffman v. Perkinson (In re Harbour)*, 840 F.2d 1165, 1183-1184 (4th

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[3] A "case" is a petition for relief under a chapter of the Bankruptcy Act. A "proceeding" is a subpart of a "case". *See* Norton & Lieb, *Jurisdiction and Procedure Under the 1984 Bankruptcy Amendments*, ANNUAL SURVEY OF BANKR. L. 53, 55-61, 63-64, 86-88 (1985).

Cir. 1988) (Widener, J., dissenting) ("It is the *'district courts'* which have jurisdiction in bankruptcy cases under 28 U.S.C. § 1334, not bankruptcy courts").

Since the district court is invested with "original" legal jurisdiction over avoidance actions seeking a money judgment, and merely transfers its jurisdiction over such matters to the bankruptcy judges under § 157(a) and (b)(1), the bankruptcy judges must necessarily receive or share, with each referred case, as much of the district court's legal jurisdiction as is necessary to decide such traditionally legal actions. *Boss-Linco Lines, Inc. v. Laidlaw Transp., Ltd. (In re Boss-Linco Lines, Inc.)*, 55 B.R. 299, 305 (Bankr. W.D.N.Y. 1985). (As a result of the 1984 Act, "[t]he bankruptcy courts currently have authority to exercise not only much of the jurisdiction characterized as 'summary' under [the 1898] Act, but also preference and fraudulent conveyance jurisdiction which had been 'plenary' under that Act."). One component of the authority of bankruptcy judges to hear, determine, and enter judgments in legal actions, that they must either inherently possess or that is impliedly transferred with the transfer of the adjudicatory power itself, is the authority to employ a jury as a finder of fact.[4]

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[4] Whether a bankruptcy judge could have presided over a jury trial of the trustee's action is an issue that never arose in this case. Had the bankruptcy judge determined that Granfinanciera and Medex were entitled to a jury trial, but that under *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), he could not conduct it, the problem could easily have been resolved by a withdrawal of reference under 28 U.S.C. § 157(d) ("The district court may withdraw, in whole or

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B. Congress could not transform the trustee's historically legal cause of action into an equitable one or deprive petitioners of their Seventh Amendment rights by assigning the trial and determination of the action to a specialized court of equity.

The unification of summary and plenary or equitable and legal bankruptcy jurisdiction in the district court, and thus in the bankruptcy judges as inseparable components of that court under the 1984 Act, is analogous to the merger of law and equity jurisdiction in the district courts by the adoption of the Federal Rules of Civil Procedure in 1938. Since the merger of legal and equitable civil jurisdiction could not abrogate the Seventh Amendment's command that juries determine legal rights and remedies, *see Dairy Queen, Inc. v. Wood*, 369 U.S. at 471-472, the merger of legal and equitable bankruptcy jurisdiction may not be treated differently. Having created a district court/bankruptcy judge amalgam of shared legal jurisdiction, Congress cannot strip a traditional legal action assigned to that forum of its Seventh Amendment status. *See Pernell v. Southall Realty*, 416 U.S. at 383; *Curtis v. Loether*, 415 U.S. at 195.

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in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown"). *See, e.g., Eisenberg v. Guardian Group, Inc. (In re Adams, Browning & Bates, Ltd.)*, 70 B.R. 490, 498 (E.D.N.Y. 1987) where the bankruptcy judge, uncertain of her authority to conduct a jury trial in a preference and fraudulent transfer action, offered to return the matter to district court if the parties did not consent to a jury trial before her.

Even if bankruptcy judges are collectively regarded as a type of "specialized court of equity," *see Curtis v. Loether*, 415 U.S. at 195, the law is equally clear that legal rights and remedies do not lose their Seventh Amendment identity merely by being presented in an equitable forum. As this Court stated of a legal claim subsumed within an equitable derivative action, "The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action," and "legal claims are not magically converted into equitable issues by their presentation to a court of equity. . . ." *Ross v. Bernhard*, 396 U.S. at 538. Similarly, Congress cannot magically convert historically legal causes of action into equitable proceedings by labeling them "core" proceedings, and thus "nullify the Seventh Amendment". *Edelman v. Michigan Blueberry Growers Ass'n. (In re Silver Mill Frozen Foods, Inc.)*, 80 B.R. 848, 854 (Bankr. W.D. Mich. 1987). *See also*, cases collected in Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 Minn. L. Rev. 601, 652 n. 251 (1988).

Katchen v. Landy does not require a contrary result and, in fact, is supportive of the petitioners' position herein. There, petitioner filed claims in bankruptcy. The trustee objected and responded with a petition asserting that the claimant had received voidable preferences and demanding judgment for their amount.

In sustaining the referee's authority to adjudicate the trustee's preference action in a summary proceeding without a jury, this court relied exclusively on the various procedural consequences flowing from the petitioner's status as a claimant in bankruptcy. First, the power to

allow, disallow and reconsider claims against the bankrupt's estate was an administrative function of the bankruptcy court that traditionally was exercised in a summary fashion. *Katchen v. Landy*, 382 U.S. at 329-330. Secondly, § 57(g) of the 1898 Act (30 Stat. 560, as amended), expressly disallowed the claims of creditors who had received voidable preferences unless they first surrendered their preferences. The § 57(g) process for determining the existence of a voidable preference was made statutorily inseparable from the process of allowing or disallowing the preferred creditor's claim. *Id.* at 330. Thus, a determination of the trustee's objection to a claim under § 57(g) would necessarily supplant and render meaningless a separate and subsequent plenary action on the preference alone. *Id.* at 331-334. Thirdly, the petitioner could not object to the loss of the right to be sued in a plenary action because, by filing a proof of claim, and thereby invoking the aid of the bankruptcy court, he was bound by the procedural consequences of his choice. *Id.* at 332 n. 9, 334. In final response to the petitioner's argument that the procedure below abrogated his Seventh Amendment rights to a plenary jury trial of the preference action, this Court stated that it would "dismember" the congressional scheme, and be inconsistent with the expeditious purposes of the 1898 Act to hold the claims process in abeyance until the preference action was heard since it was the intent of Congress that claims, and § 57(g) objections to claims, be speedily and summarily resolved. 382 U.S. at 336-340.

Significantly, *Katchen v. Landy* excepted from its Seventh Amendment analysis a factual situation indistinguishable from the present case, in which a defendant

files no claim in bankruptcy and there is no § 57(g) objection to litigate:

> But although petitioner might[5] be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 53 S.Ct. 50, when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity.

382 U.S. at 336. It is the act of claiming against the debtor's estate in *Katchen*, and nothing less, that "converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*." *Id.* Courts allowing jury trials in core proceedings against non-claimants have distinguished *Katchen* on precisely that basis. *See, e.g., Edelman v. Michigan Blueberry Growers Ass'n*, 80 B.R. at 852-854; *Daily v. First Peoples Bank of New Jersey*, 76 B.R. 963, 966 (D.N.J. 1987); *Zimmerman v. Cavanagh (In re Kenval Marketing Corp.)*, 65 B.R. 541, 550-551 (E.D. Pa. 1986); *Hassett v. Weissman (In re O.P.M. Leasing Services, Inc.)*, 48 B.R. 824, 827 n. 2 (S.D.N.Y. 1985). Courts which rely on *Katchen* to disallow jury trials in such cases, on the other hand, impermissibly ignore or minimize *Katchen*'s pivotal distinction between claimants and non-claimants. *See, e.g.,*

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[5] The term "might" is not an "equivocation" of *Schoenthal* as suggested in *DuVoisin v. Anderson (In re Southern Indus. Banking Corp.)*, 66 B.R. 370, 374 (Bankr. E.D. Tenn. 1986), but simply reflects the fact that even a non-claimant will not be entitled to a jury trial in a plenary action if the trustee demands only equitable relief. *Edelman v. Michigan Blueberry Growers Ass'n*, 80 B.R. at 852-853.

Nordberg v. Granfinanciera, (Pet.Cert.App. 16) ("If . . . Congress may convert a creditor's legal right into an equitable claim . . . Congress may likewise treat other core proceedings in bankruptcy such as actions to avoid fraudulent transfers. . . ."); *Huffman v. Perkinson*, 840 F.2d at 1176 ("[A]ctions that are, and always have been considered to be, legal for seventh amendment or other purposes, become equitable when merged into bankruptcy proceedings").

Equally unsupportive of the trustee's position are those cases which recognize that Congress may deny a Seventh Amendment right to a jury trial in statutory causes of action it assigns to a non-Article III or legislative tribunal. Although bankruptcy judges under the 1984 Act are non-Article III judges because they lack the tenure and salary guarantees of that article, 28 U.S.C. §§ 152, 153 (98 Stat. 336, 338), *see Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. at 57-61, it is not clear that such judges are absolutely precluded from presiding over jury trials. Congress could not, in any event, transmute an historically legal common law cause of action into one outside the protection of the Seventh Amendment by assigning its determination to judges who are constitutionally incapable of presiding.

The causes of action that may be entrusted to non-Article III tribunals without an attendant right of jury trial, however ill-defined in the current case law, certainly do not include those with well-established common law antecedents. In *Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977), for example, administrative penalties for unsafe workplaces were found to have "created a new cause of action, and remedies therefor, unknown to the common law." *Id.* at 461. Throughout the opinion this Court

stressed the need for the statutory cause of action to have been essentially unanticipated in the common law, impliedly limiting the jurisdiction of non-Article III tribunals to "new statutory obligations," *id.* at 450; "new types of litigation," *id.* at 455; and "new public rights and remedies." *Id.* at 460. *See also, National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937), where this Court observed of an administrative action ordering an employee reinstated and back wages paid that "the proceeding is one unknown to the common law. It is a statutory proceeding."

Crowell v. Benson, 285 U.S. 22 (1932) illustrates another aspect of the rule limiting the entrustment of common law rights to non-Article III tribunals. There, a private right – a worker's right to sue for injuries received in maritime employment – was supplanted by an administrative remedy under the Longshoremen's & Harbor Workers' Compensation Act. While traditional admiralty jurisdiction over such claims was of ancient origin, administrative jurisdiction did not violate the Seventh Amendment because admiralty cases, like equity cases, were not considered suits at "common law." *Id.* at 52; *Waring v. Clark*, 46 U.S. (5 How.) 441, 460 (1847).

Nor are traditional common law rights and remedies converted into some non-legal form, outside the protection of the Seventh Amendment, by virtue of the public rights doctrine. Public rights are matters that historically "could be conclusively determined by the Executive and Legislative Branches," as distinguished from those matters that are inherently judicial, *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. at 68, *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 589 (1985), but which Congress chooses to entrust to a quasi-

judicial, or non-article III tribunal.[6] Public rights may also subsume private rights with which they become inextricably interwoven if a litigant voluntarily submits them for disposition to a non-article III forum. *See Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245, 3258-3260 (1986); *Katchen v. Landy*, 382 U.S. at 322 n. 9.

In contradistinction to each of the theories discussed above, the trustee's complaint against Granfinanciera and Medex alleges an action and remedy of ancient common law lineage that has always been litigated at law. Petitioners, of course, have filed no claims against the debtor's estate. The trustee's action, under these circumstances, maintains its common law and Seventh Amendment identity in any tribunal to which it is assigned. *See* Gibson, *supra*, at 655 n. 262.

C. Bankruptcy Acts since 1898 have permitted jury trials in trustees' avoidance suits seeking monetary remedies against non-claimants.

No statutory provisions on jury trials in bankruptcy are applicable to this proceeding.[7] Nevertheless, an

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[6] Notwithstanding dicta in *Northern Pipeline*, 458 U.S. at 71, that "the restructuring of debtor-creditor relations . . . may well be a 'public right'," it is difficult to conceive of a garden variety lawsuit by a private bankruptcy trustee seeking monies that will, in all likelihood, be distributed to private creditors, as involving a "public right."

[7] Although §1411 of the 1984 Act provides, albeit ambiguously, some right to jury trial (See Point II.C, infra.), §122b (98 Stat. 346) of the 1984 Act provided that "section 1411(a) of title

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understanding of the treatment accorded jury trials in actions to recover monetary fraudulent transfers under the 1898 and 1978 Acts, and of the legislative background of §1411 of the 1984 Act, will demonstrate that Congress unambiguously opted for jury trials of fraudulent transfer and other legal actions under the first two Acts, and failed to enact anything in 1984, even if it had the constitutional power to do so, abolishing that long-standing practice. This course of congressional action suggests that Congress neither intended to create a legislative bankruptcy court or a specialized court of equity under

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28, United States Code, as added by this Act, shall not apply with respect to cases under title 11 of the United States Code that are pending on the date of enactment of this Act or to proceedings arising in or related to such cases." Since the debtor's "case" herein, *i.e.*, its petition for reorganization filed May 18, 1983, was pending on July 10, 1984, the date the 1984 Act became law, §1411(a) is not applicable to the trustee's proceeding against Granfinanciera and Medex.

Section 1480, the jury trial provision in the 1978 Act, is likewise inapplicable. Notwithstanding the uncertainty surrounding the inconsistent repealing effects of §113 (98 Stat. 343) and §121 (98 Stat. 345) of the 1984 Act on § 402(b) (92 Stat. 2682), which, along with §405(b) (92 Stat. 2685), provided the initial effective date for § 1480, the July 10, 1984 enactment of §1411 and the unequivocal repeal of §405(b) by §114 (98 Stat. 343) undoubtedly effected the demise of §1480. Certainly, nothing in the legislative history of §1411 suggests that Congress intended §1480 to have continuing validity after July 10, 1984.

Therefore, absent any specific legislation in force providing jury trials for cases filed before July 10, 1984, but tried afterwards, the petitioners' right to jury trial in this proceeding must necessarily be predicated entirely on the Seventh Amendment as discussed in Point I, *supra*.

the 1984 Act in which all proceedings must be litigated without a jury, nor regarded fraudulent transfer proceedings as inherently equitable.

Pursuant to the 1898 Act, as amended, under which *Schoenthal* was decided, "[s]uits to recover preferences constitute[d] no part of the proceedings in bankruptcy but concern[ed] controversies arising out of it." 287 U.S. at 94-95. A trustee seeking to recover a monetary preference or fraudulent transfer in the adverse possession of a third party non-claimant had to commence a "plenary" suit at law in which the defendant had a right to jury trial. Only when the transferred monies were in the actual possession of the bankruptcy court, or the defendant's possessory claim was made in bad faith and without legal justification, or the parties consented to bankruptcy court jurisdiction, or the matter involved the ordinary administration of the debtor's estate, could the bankruptcy court (actually a bankruptcy referee sitting in district court) decide the dispute in a "summary" or non-jury fashion. *See* Bankruptcy Act of 1898, §§ 19(c), 23 (30 Stat. 551, 552); *Katchen v. Landy*, 382 U.S. at 327-328; *Harrison v. Chamberlin*, 271 U.S. 191, 193-195 (1926); *Boss-Linco Lines, Inc. v. Laidlaw Transp. Ltd.*, 55 B.R. at 303; Gibson, *supra*, at 605-606.

The Bankruptcy Act of 1978, effective October 1, 1979 (92 Stat. 2549), abolished the summary/plenary distinction and vested jurisdiction over proceedings falling under both former categories in a new, consolidated Bankruptcy Court. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 206 n. 13 (1983); *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. at 53-55; S.Rep. No. 989, 95th Cong., 2d. Sess. 18 (1978) *reprinted in* 1978 U.S.

Code Cong. & Admin. News 5787, 5803-5804. Section 1480(a) (92 Stat. 2671) of title 28 of the 1978 Act provided, however, that with the exception of a limitation on jury trials in involuntary bankruptcy proceedings, nothing in amended titles 11 or 28 affected "any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979 [the last effective day of the 1898 Act]".

Notwithstanding the statutory demise of the summary/plenary distinction by virtue of the consolidation of both forms of action in the new bankruptcy court, Congress intended that the distinction still be applied in determining a litigant's right to jury trial. H.R. Rep. No. 595, 95th Cong., 1st Sess. 12, 448 (1977) *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 5973, 6404, states:

> Proposed section 1480 requires that the right of jury trial be preserved as it is under present law. Bankruptcy courts will be required to hold jury trials to adjudicate what are under present law called "plenary suits," that is, suits that are brought in State or Federal courts other than the bankruptcy courts.
>
> . . . .
>
> Subsection (a) [of §1480] continues any current right to litigants in bankruptcy cases, and cases related to bankruptcy cases, such as plenary actions, to a jury trial. . . .

See also, S. Rep. No. 989 at 157, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5943.

As a consequence of the language and legislative history of § 1480(a), a majority of courts applied some form of summary/plenary analysis when determining a

litigant's right to a jury trial in preference and fraudulent transfer proceedings filed under the 1978 Act. *See, e.g., Farmers & Merchants Nat'l Bank v. Aylesworth (In re Arnett Oil, Inc.)*, 44 B.R. 603 (N.D.Ind. 1984); *Beck v. Fairchild Aircraft Corp. (In re Sunair Int'l, Inc.)*, 32 B.R. 142 (Bankr. S.D. Fla. 1983); *Belfance v. Sizzler Family Steak Houses (In re Portage Assocs., Inc.)*, 16 B.R. 445 (Bankr. N.D. Ohio 1982). *See also*, cases collected in Gibson, *supra*, at 610 nn. 42 & 43, 611-612 n. 46. These courts, however, regarded the test for determining whether a preference or fraudulent transfer action was plenary or summary for jury trial purposes as far simpler than that required under the 1898 Act for resolving jurisdictional disputes. *See, e.g., McLouth Steel Corp. v. Marblehead Lime Co. (In re McLouth Steel Corp.)*, 55 B.R. 357, 361-362 (E.D.Mich. 1985) ("Using the summary/plenary framework to determine the right to jury trial does not interfere with Congress' intent to eliminate time consuming jurisdictional battles"); *Jahn v. Lamb (In re Lamb)*, 29 B.R. 950 (Bankr. E.D. Tenn. 1983) ("[U]sing the [summary/plenary] distinction on the jury trial question is not the same as using it to determine what court can try the case and should not result in the same kind of delay").

The simplified summary/plenary analysis applied by this group of courts devolved largely into a determination of whether the trustee was seeking entirely monetary relief against a third party non-claimant. If he was, his action was sufficiently analogous to a "plenary" action to require a jury trial. *See, e.g., Beck v. Fairchild Aircraft Corp.*, 32 B.R. at 145-146 ("[I]f the preference suit seeks only the recovery of money, it is a plenary proceeding. . . ."); *Farmers & Merchants Nat'l Bank v. Aylesworth*, 44 B.R. at

604 (The "Trustee requested a money judgment in his complaint and did not seek any equitable relief. Farmers did not file a claim with the Bankruptcy Court. Accordingly, the facts of this case, analyzed under the law as stated in *Schoenthal*," require a jury trial).

A second group of courts affirmed the pre-1978 right to jury trial where a trustee sought a monetary recovery against a non-claimant, but did so without resort to a summary/plenary analysis. These courts found Congress' abolition of the summary/plenary distinction for jurisdictional purposes to be inconsistent with its judicial preservation even for the limited purpose of determining a litigant's right to jury trial. However, since Congress, in enacting § 1480(a), plainly intended to preserve existing rights to jury trial, these courts interpreted § 1480(a) as necessarily permitting, if not requiring, a traditional Seventh Amendment analysis. *See, e.g., Young v. Peter J. Saker, Inc. (In re Paula Saker & Co, Inc.)*, 37 B.R. 802, 807 (Bankr. S.D.N.Y. 1984); *Martin Baker Well Drilling, Inc. v. Koulovatos (In re Martin Baker Well Drilling, Inc.)*, 36 B.R. 154, 155-156 (Bankr. D. Me. 1984). *See also*, cases cited in Gibson, *supra*, at 610-611 n. 44, 613 n. 53, 614.

The two analyses of § 1480, discussed above, did not lead to inconsistent results. *Young v. Peter J. Saker, Inc.*, 37 B.R. at 807 n. 5, (A "summary/plenary analysis ultimately reduces itself to a law/equity analysis"); *Zimmerman v. Cavanagh*, 65 B.R. at 554 n. 5 ("[I]t ultimately makes little difference which standard is applied, for the result will almost always be the same."). Whatever conceptual approach is used, Granfinanciera and Medex would clearly have been entitled to a trial by jury under the 1978 Act.

The 1984 Act impliedly repealed § 1480(a) and replaced it with 28 U.S.C. § 1411(a) (98 Stat. 335). Section 1411(a) states that "Except as provided in subsection (b) of this section [limiting jury trials in involuntary proceedings], this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." The legislative history of § 1411, or more accurately the complete lack thereof, strongly suggests that Congress, even if it possessed constitutional authority to do so, did not intend to abolish or limit the right to jury trial in historically legal core proceedings. *Cf. Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) ("It is clear, of course, that no Act of Congress can authorize a violation of the Constitution").

After *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. at 84-87, held that the broad grant of jurisdiction to the bankruptcy court under 28 U.S.C. § 1471 (92 Stat. 2668), of the 1978 Act violated Article III, Congress began the process of formulating a constitutional jurisdictional scheme. The process in the House of Representatives culminated on March 21, 1984, with the passage of H.R. 5174, incorporating amendments by Reps. Kastenmeier and Kindness. 130 Cong. Rec. H1853-54 (daily ed. March 21, 1984). The Kastenmeier/Kindness amendment replaced the Article III bankruptcy court proposed by Rep. Rodino, 130 Cong. Rec. H1807, 1826 (daily ed. March 21, 1984) (statements of Rep. Rodino and Rep. Matsui, co-sponsor of H.R. 5174) with a non-Article III tribunal. The Kastenmeier/Kindness amendments did not contain any provision for jury trials. H.R. 5174, 98th Cong., 2d Sess., 130 Cong. Rec. H1789-92

(daily ed. March 20, 1984). The floor debates on H.R. 5174 and its amendments contain no explanation for why jury trials were not mentioned in the House bill.[8]

In the Senate, by contrast, the membership unambiguously expressed its intention to preserve the right of jury trial in proceedings to which the right attached before the 1978 Act. Senators Thurmond and Heflin sponsored an amendment to H.R. 5174, numbered as § 1411(a),

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[8] Representatives Kastenmeier and Kindness stated that their amendment was "essentially a legislative enactment" of the emergency bankruptcy rules proposed by the Judicial Conference and adopted after *Northern Pipeline Co.* 130 Cong. Rec. H1847, 1849 (daily ed. March 21, 1984). Paragraph (d)(1)(D) of the rules (*reprinted in* 1 COLLIER ON BANKRUPTCY ¶3.01 at 3-16 (15th ed. 1979)), prohibited bankruptcy judges from conducting jury trials but added that "[t]hose matters which may not be performed by a bankruptcy judge shall be transferred to a district judge". Obviously, a fraudulent transfer action demanding monetary remedies did not lose its legal status under ¶ (d)(1)(D), but could simply have been transferred to the district court for trial. More importantly, since the emergency rules incorporated the concept of "core" jurisdiction, and at the same time allowed jury matters to be referred to and heard by a district court judge, the 1984 Act reflects Congress' belief that jury trials are compatible with "core" proceedings. Congress later manifested its approval of jury trials even in bankruptcy court when, in 1983, this court approved (461 U.S. 975, 1078, 1084), and Congress failed to modify under 28 U.S.C. § 2075 (78 Stat. 1001), rules of procedure for conducting jury trials in bankruptcy. *See* Rules 9015, 9027 (repealed, August 1, 1987); *see also, Wolff v. Wells Fargo Bank (In re Moralez)*, 618 F.2d. 76, 78 n. 1 (9th Cir. 1980) (Failure of Congress to change the proposed bankruptcy rules indicates that the rules were consistent with congressional policy).

reading: "Except as provided in subsection (b) of this section this chapter and title 11 do not affect any right to trial by jury." Subsection (b) read as it does now. 130 Cong. Rec. S6108 (daily ed. May 21, 1984). In explaining his amendment, Sen. Thurmond stated:

> We have also added a provision regarding jury trials. This provision was included in S. 1013 but was not made a part of the House bill. It simply states that nothing in chapter 87 of title 28 or in title 11 affects any right to trial by jury. It does not affect in any way current law determining when a party is entitled to a jury trial.

130 Cong. Rec. S6082, 6084 (daily ed. May 21, 1984). Sen. DeConcini offered another amendment that essentially tracked the language of § 1480 (a) of the 1978 Act. 130 Cong. Rec. S6099, 6127-28 (daily ed. May 21, 1984). Sen. Tower offered an amendment to § 1411 (a) of the Thurmond/Heflin substitute that would have replaced the phrase "right to trial by jury" with "right guaranteed under the United States Constitution to trial by jury." 130 Cong. Rec. S6280 (daily ed. May 22, 1984).

On June 19, 1984, Senators Thurmond and Heflin again clarified the intent and purpose of their amendment:

> Mr. HEFLIN. Mr. President, there has been some question about the status of jury trials in the bankruptcy law. . . .
>
> . . . The purpose of [the amendment] is to eliminate any possible ambiguity as to Congress' original intent in connection with the preservation of rights to jury trials. When Congress passed [§ 1480] as part of the Bankruptcy Reform Act of 1978, it intended to maintain the status quo on jury trial rights as such

> rights had existed prior to the expansion of the Bankruptcy Court's jurisdiction. However, as drafted, the provision engendered confusion as to how to determine when a litigant was entitled to a jury trial. Moreover, courts differed on what was meant by the phrase "any statute in effect on September 30, 1979." It was not clear whether "statute" encompassed the U.S. Constitution as well as the various State constitutions.
>
> This changing [sic] language is intended to clarify Congress' original intention that the expansion of powers granted to the bankruptcy system under the Bankruptcy Reform Act of 1978 was not intended to alter rights to jury trials which might have existed under State or Federal law prior to 1978. Congress never intended that the filing of a bankruptcy petition by a debtor act as an escape hatch from jury trials.
>
> Thus, where a debtor, creditor or noncreditor third party would have had a right to a jury trial on an issue of fact pursuant to Federal or State law absent application of the bankruptcy laws, this amendment ensures that such rights remain intact. This is true whether or not an entity requesting a jury trial has filed a proof of claim with the bankruptcy court.
>
> Mr. President, I would like to make an inquiry of the distinguished floor manager concerning two sections of the bill. The first concerns § 102 as it amends § 1411 of title 28 of the United States Code.
>
> Would you agree that the intent of the amendment you are making is only to simplify the language of existing law and there is no intention to effect any substantive change?
>
> Mr. THURMOND: Yes, the Senator is correct.

130 Cong. Rec. S7618-19 (daily ed. June 19, 1984). The Thurmond/Heflin amendment passed the Senate on June

19, 1984. 130 Cong. Rec. S7619, 7625 (daily ed. June 19, 1984). House and Senate conferees then met and, among other changes, produced the present text of § 1411(a) that was approved by both houses on June 29, 1984.

The legislative history on what occurred in conference is virtually nonexistent. No House or Senate Report was prepared and the House Conference Report, which consisted solely of the text of H.R. 5174, did not contain a joint explanatory statement. Statements of floor leaders on June 29, 1984, provide the only insight into the conference process but fail to explain what was intended by the language of § 1411(a).

Senator Thurmond observed that "[n]ew language on the issue of jury trials is included. Section 1411 will now provide that this chapter of title 28 and title 11 do not affect a right to trial by jury under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." 130 Cong. Rec. S8888 (daily ed. June 29, 1984). No other Senator or Senate conferee addressed the treatment of jury trials in H.R. 5174.

In the House, Rep. Kastenmeier, after speaking of the procedures incorporated into the bill for personal injury and wrongful death cases, stated that "in this narrow range of cases the parties do not lose any right to a jury trial that they may have had if the claim had been cognizable outside the bankruptcy context." 130 Cong. Rec. H7492 (daily ed. June 29, 1984). Of the fourteen House managers or conferees, thirteen spoke, but only three even mentioned the jury trial provision they had just passed. Of the three, only Rep. Kastenmeier's short and ambiguous statement could conceivably be understood as

endorsing a restrictive effect for § 1411. 130 Cong. Rec. H7489-97 (daily ed. June 29, 1984).

In the absence of evidence of the conferees' intent, the sense of both houses of Congress on the jury trial issue, as inferred from the general course of debate, becomes of heightened importance. *Cf. Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440, 463 n. 8 (1937) (When legislation is obscure one may look "to the debates in general in order to show common agreement on purpose as distinguished from interpretation of particular phraseology"); *Federal Trade Comm'n v. Raladam Co.*, 283 U.S. 643, 650 (1931) ("[T]he fact that throughout the consideration of this legislation there was common agreement in the debate as to the great purpose of the act, may properly be considered in determining what that purpose was and what were the evils sought to be remedied").

Furthermore, even the absence of debate in Congress over the obviously important issue of jury trials is highly significant. Radical changes in the existing legal order should not be deemed effected by Congress "without the consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate as to the desirability, of so fundamental a change. . . ." *Ozawa v. United States*, 260 U.S. 178, 194 (1922). *See also, United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 108 S.Ct. 626, 634 (1988) ("[I]t is most improbable that [a "major change in the existing rules"] would have been made without even any mention in the legislative history."); *cf. United States v. James*, 106 S.Ct. 3116, 3123 (1986) (Congressional debate of the issue

shows that the statutory language "was no drafting inadvertence" and that "Congress understood what it was saying"); *United States v. Pfitsch*, 256 U.S. 547, 551, 552 (1921) (Senate's express relinquishment of its version after a conference with the House showed that the final language "was the result not of inadvertence, but of deliberate action in the face of opposition"; "It is plain, then, that Congress had this question presented to its attention in a most precise form.").

Clearly, if Congress had intended to effect a major change in the bankruptcy law by eliminating jury trials in fraudulent transfer actions, it would have done so in specific, unambiguous language:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-267 (1979). The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." Swarts v. Hammer, 194 U.S. 441, 444 (1904). . . .

Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494, 501 (1986). *See also, Thompson v. Thompson*, 218 U.S. 611, 618 (1910) (Far reaching changes "should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention."); *Wolfe v. First Fed. Savings & Loan Ass'n of Paragould (In re Wolfe)*, 68 B.R. 80, 88 (Bankr. N.D. Tex. 1986) (A proceeding as significant as a jury trial would have been "explicitly prohibited" if that was Congress' aim. The court refused to indulge the presumption that § 1411 was simply an "inartfully drafted prohibition against jury trials. . . .").

Section 1411(a) is plainly ambiguous. It does not prohibit the jury trial of any issue in any court but simply says that nothing in titles 11 or 28 affects any right to trial by jury in claims for personal injury or wrongful death. This is entirely consistent with a construction that for all other legal causes of action the right of jury trial remains as it was under bankruptcy or common law. Moreover, by stating in § 1411(b) that a district court "may order the issues arising [in involuntary proceedings] under section 303 of title 11 to be tried without a jury", Congress implies that § 303 issues may sometimes be tried with a jury. Since nothing in § 303 or in the 1984 Act grants a right to jury trial in involuntary proceedings, the right to a § 303 jury trial must originate either in § 1411(a) or the Seventh Amendment. Section 1411 therefore appears to create new jury rights not eliminate any. More fundamentally, if § 1411(a) had been intended to eliminate all jury actions in bankruptcy § 1411(b), eliminating jury trials in involuntary proceedings, would be completely unnecessary. *See* Gibson, *supra*, at 624-25; COWANS, 1 BANKRUPTCY LAW & PRACTICE, § 1.6 at 61 (1987 ed.).

The circumstantial evidence suggests that the language of § 1411 was inadvertent and that the conferees were simply interested in insuring that tort claimants, particularly asbestosis victims, did not lose their rights to jury trial in bankruptcy. *See* 130 Cong. Rec. H1850, 1851

(daily ed. March 21, 1984) (statements of Reps. Kastenmeier and Frank); 130 Cong. Rec. S6098-99 (daily ed. May 21, 1984) (statements and amendment to H.R. 5174 by Sen. DeConcini); 130 Cong. Rec. S7621, 7622 (daily ed. June 19, 1984) (statements by Sen. DeConcini); admission of Sen. DeConcini, a Senate conferee, in the presence of Sen. Dole, another conferee, that the conferees did not intend to alter or modify the right to jury trial allowed under the 1978 Act, 3 ABJ NEWSLETTER 1, 3, (Winter 1984-1985), *quoted in* Gibson, *supra*, at 629 n. 128. Given the large number of inconsistencies and errors identified in other parts of the 1984 Act – which one commentator describes as establishing "a record for inept performance by Congress" – the failure of Congress to draft an unambiguous jury trial provision becomes less inscrutable. *See* Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, ANNUAL SURV. OF BANKR. L. 1, 30-31 (1985).

In light of the intractable ambiguity of § 1411, the absence of any congressional debate or explanation, and considering that the ambiguity concerns the presence or absence of constitutional and judicially developed rights to jury trial in traditionally legal causes of action, it is virtually impossible to conclude that Congress silently intended to eliminate in § 1411 all rights to jury trial in all core bankruptcy proceedings. There simply is no remotely persuasive evidence in the legislative history of § 1411 to suggest that Congress intended to effect such a radical, and, petitioners submit, unconstitutional, change in the law.

CONCLUSION

A bankruptcy trustee's action to recover a monetary transfer has a long history in England and in this country as a legal cause of action triable to a jury. Congress has confirmed both the legal nature of the trustee's cause of action and the right to jury trial of that action in the bankruptcy acts of 1898 as amended, and 1978, and has not, in the 1984 Act, shown that it has changed its mind. Under principles of bankruptcy jurisdiction that recognize the right to jury trial in legal or plenary-type proceedings under the Seventh Amendment and considering that "[t]he federal policy favoring jury trials is of historic and continuing strength," *Simler v. Conner*, 372 U.S. 221, 222 (1963), Granfinanciera and Medex are entitled to a jury trial in this proceeding. Accordingly, petitioners request that the decision of the circuit court be reversed and the proceedings remanded to the bankruptcy court for retrial before a jury.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 1334

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

RESPONDENT'S

BRIEF

[redacted]

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OPINIONS AND JUDGMENTS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 835 F.2d 1341 and appears in the appendix to the petition for certiorari at pp. 1-17. The judgment and opinion of the bankruptcy court (Pet. Cert. App. 24-32) and the decision of the district court affirming the bankruptcy court (Pet. Cert. App. 18-23) were not officially reported.

JURISDICTION OF THIS COURT

Jurisdiction of this Court is based on 28 U.S.C. § 1254(1). The decision of the Eleventh Circuit Court of Appeals was rendered January 19, 1988. The petition for certiorari was timely filed within 90 days thereof, on April 18, 1988, pursuant to 28 U.S.C. § 2101(c).

CONSTITUTION AND STATUTES

Seventh Amendment, United States Constitution	(Pet. Cert. 3)
28 U.S.C. § 157	(Pet. Cert. App. 42)
28 U.S.C. § 1411	(Pet. Cert. App. 45)
11 U.S.C. § 548	(Pet. Cert. App. 45)
11 U.S.C. § 550	(Pet. Cert. App. 47)
28 U.S.C. § 1334	(Appendix to Brief)

STATEMENT OF THE CASE

The debtor, Chase & Sanborn Corporation, filed a petition for reorganization under Chapter 11 of the 1978 Bankruptcy Act on May 18, 1983. (Pet.Cert.App. 37). On May 17, 1985, respondent, Paul C. Nordberg, creditor trustee for the debtor, filed a complaint against petitioners Granfinanciera, S.A. and Medex, Ltda., in the United States District Court for the Southern District of Florida, to recover certain fraudulent transfers under 11 U.S.C. §§ 548(a)(1) and (2), and 550. The complaint was filed in district court rather than in bankruptcy court because, according to the trustee's assertion in paragraph one of his complaint, "recent precedent suggests that transfer avoidance actions may only be heard and decided by judges serving pursuant to Article III of the United States Constitution, *i.e.*, federal district court judges." (Pet.Cert.App. 37).

In Count I of his complaint the trustee alleged that on October 20, 1982, December 15, 1982, and December 16, 1982, the debtor (a term which included its predecessor in interest, General Coffee Corporation, collectively referred to in the complaint as "C&S"), transferred $1,700,000 from its New York and Miami, Florida, bank accounts into Granfinanciera's and Medex's Miami bank accounts. These transfers were constructively fraudulent under § 548(a)(2), because, among other reasons, the debtor had received no consideration or reasonably equivalent value from Granfinanciera and Medex in return. Count II incorporated these allegations and further alleged that the transfers were actually fraudulent under § 548(a)(1) since they were made by the debtor "with the actual intent to

hinder, delay and defraud the other creditors of C&S." (Pet.Cert.App. 39-40;45-46).

The trustee's complaint demanded judgment against Granfinanciera and Medex, jointly and severally, as follows:

> (i) As to Count I, avoiding the payments to the Defendants as fraudulent transfers pursuant to 11 U.S.C. § 548(a)(2), and awarding damages to the estate of C&S in an amount of not less than $1,700,000 pursuant to 11 U.S.C. § 550(a);
> (ii) As to Count II, avoiding the payments to the Defendants as fraudulent transfers pursuant to 11 U.S.C. § 548(a)(i) [sic], and awarding damages to the estate of C&S in an amount not less than $1,700,000 pursuant to 11 U.S.C. § 550(a);
> (iii) Awarding the estate of C&S the costs and expenses of this action; and
> (iv) Granting the estate of C&S such other and further relief as is just and proper, such as interest from the date of each transfer complained of herein.

(Pet.Cert.App. 41).

On July 12, 1985, the United States District Court for the Southern District of Florida referred all proceedings on the tru tee's complaint to the bankruptcy court. (J.A. 1). Granfinanciera and Medex filed their answer in bankruptcy court on February 19, 1986. (J.A. 2-7).

Granfinanciera and Medex answered each paragraph of the complaint with a denial or an assertion of lack of knowledge. Their affirmative defenses included allegations that they "acted as a mere conduit for the transfer of funds by General Coffee Corp. to other entities, and as such . . . never received any benefit from this transaction and are therefore not liable under Section 548 of the

Bankruptcy Code" (J.A. 5); and that they came within the exception to liability contained in § 548(c) for good faith transfers for value. (J.A. 6-7). Granfinanciera and Medex concluded their answer with the sentence: "Further, Defendants demand trial by jury on all issues so triable." (J.A. 7). The trial judge denied the petitioners' request for a jury trial stating that there were no "triable jury issues" in a fraudulent transfer action and that such an action "under the English common law, as I understand it, was a non-jury issue." (Pet.Cert.App. 34-35).

The proofs at trial showed that Granfinanciera and Medex were Columbia, South America-based banking and lending institutions (T.(2/20)-121 to 122)[1] which maintained correspondent relationships with several banks in the United States, including Banco Real, a Brazilian bank with offices in New York and Miami, Florida. (T.(4/10)-99). On October 20, 1982, General Coffee wired directions to Banque Worms, in New York, at which it maintained an account, to transfer $1,500,000 to Morgan Guaranty in New York, to credit the account of Banco Real, in New York, to further credit the account of Granfinanciera at Banco Real in Miami. Granfinanciera stipulated that these funds were received in its account. (T.(2/20)-72 to 73). Medex similarly stipulated that two

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[1] The record before the circuit court consisted of three volumes of pleadings and other filed documents, and numerous loose and unindexed depositions that were admitted in lieu of live testimony, trial transcripts, and documentary trial exhibits. Trial transcripts will be cited by a "T" followed by the month and day in 1986, in parentheses.

cashier's checks, one for $100,000, dated December 15, 1982, and the other for $80,000, dated December 16, 1982, drawn on General Coffee's Royal Trust Bank account in Miami, were credited to Medex's separate account at Banco Real, Miami. (T.(2/20)-65 to 69; 72-73).

Granfinanciera sought to prove that the $1,500,000 it received from General Coffee, through Banque Worms, was actually the repayment of a loan it had made to another Colombian corporation, Voluntad Editores, Ltda. (T.(4/10)-15;23;24;27;31-33;37-45;48;53-54;93-96); and that the transfer was part of a complicated course of dealings between General Coffee, Voluntad, another Colombian corporation named Luis A. Duque Pena y Hijos, Ltda., and itself in which it acted as a mere conduit for the transferred funds and in which General Coffee received value from Duque Pena. (T.(4/10)-38 to 41;78 to 96).

The bankruptcy judge found that Granfinanciera had not acted as a mere conduit of funds, but had materially benefited from the transfer, and that no consideration had flowed from Granfinanciera or from any third party to General Coffee with respect to the transfer. (Pet.Cert.App. 28-29). Satisfied that the elements of a constructively fraudulent transfer had been established, and that Granfinanciera and Medex had not proved their defenses, the judge awarded the trustee $1,500,000 against Granfinanciera, $180,000 against Medex, and dismissed the actual fraud count with prejudice. (Pet.Cert.App. 24-30). The relief granted in the judgment provided, in its entirety:

> Accordingly, it is Ordered that count 2 of the complaint [alleging actual fraud under § 548(a)(1)] is

> dismissed with prejudice. It is further ordered that (1) the trustee shall recover from the defendant Granfinanciera the sum of $1.5 million and (2) the trustee shall recover from the defendant Medex the sum of $180,000. Costs shall be taxed on motion.

(Pet.Cert.App. 32). The monetary relief granted was thus less than the $1,700,000 and prejudgment interest that the trustee had demanded against each defendant jointly and severally.

Granfinanciera and Medex briefed the issue of their right to jury trial in their appeal to the district court. (R. 1-10;13). The district court, however, chose not to discuss that issue in affirming the judgment of the bankruptcy court. (Pet.Cert.App. 18-23).

The Eleventh Circuit Court of Appeals addressed the question, but concluded that Granfinanciera and Medex had no right to a jury trial. (Pet.Cert.App. 1, 13-17). The circuit court began its analysis by observing that the right to jury trial must arise either from the Seventh Amendment or from the statute which authorized the trustee's suit. The fradulent transfer statute, 11 U.S.C. § 548, did not provide for a jury trial and although 28 U.S.C. § 1480, as part of the Bankruptcy Reform Act of 1978 did, that section was repealed by the enactment of 28 U.S.C. § 1411 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, on July 10, 1984. Because § 1411, by the terms of the 1984 Act did not apply to bankruptcy cases, such as the present one, that were pending on July 10, 1984, no statutory authority existed for a jury trial in bankruptcy. (Pet.Cert.App. 13-14).

The Seventh Amendment did not provide a right of jury trial, the court continued, because jury trials are

simply not required in equitable actions to recover fraudulent conveyances. The fact that the bankruptcy court granted monetary relief did not change the equitable nature of the cause of action since monetary relief may flow from an equitable claim without converting the claim into a legal cause of action. (Pet.Cert.App. 14-15).

The circuit court further reasoned that because bankruptcy court jurisdiction is inherently equitable, and actions to avoid fraudulent transfers are "core" proceedings under the 1984 Act, core proceedings, as creations of the bankruptcy law, must also be inherently equitable in nature. Alternatively, citing *Katchen v. Landy*, 382 U.S. 323 (1966), the circuit court claimed that by categorizing the cause of action to avoid a fraudulent conveyance as a core proceeding, Congress, under its bankruptcy power, could convert a legal cause of action into an equitable one and thus displace a litigant's Seventh Amendment right to jury trial. (Pet.Cert.App. 15-16). The circuit court also justified the absence of jury trials in bankruptcy by the need for expeditious proceedings in that court. Jury trials, the circuit court believed, would dismember the statutory scheme of the bankruptcy laws. (Pet.Cert.App. 16-17).

Granfinanciera and Medex filed a petition for certiorari in this Court on April 18, 1988, to review the decision of the circuit court. Certiorari was granted on June 13, 1988.

SUMMARY OF ARGUMENT

Point I

The Seventh Amendment preserves the right of jury trial in statutory proceedings asserting legal rights and seeking legal remedies that are analogous to common law causes of action tried to a jury in 18th-century England. The bankruptcy trustee's fraudulent transfer suit under 11 U.S.C. § 548 of the 1984 Bankruptcy Act is analogous to an 18th-century English common law action by a bankruptcy assignee to recover a fraudulent preference or conveyance. Where the bankruptcy assignee sought a money judgment, as the trustee does here, his action would sound in trover, assumpsit, or debt and would be tried to a jury.

The trustee's demand for purely monetary relief did not lose its historically legal character by being joined with a request that the monetary transfers also be 'avoided.' *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932) held that a trustee's suit to recover, and thus implicitly avoid, a monetary preference, merely demanded a legal remedy that must be tried to a jury. Furthermore, where money has been fraudulently transferred, 'avoidance' is not even a remedy but is simply a term that defines the statutory prerequisites to recovery, including the very act of choosing to file suit, that the trustee must satisfy before he obtains a money judgment.

Point II

A bankruptcy tribunal is not a specialized court of equity or even a separate tribunal under 28 U.S.C. §§ 151,

157 and 1334 of the 1984 Act, but consists of bankruptcy judges sitting as a "unit" of the district court. The grant of original and exclusive jurisdiction to the district court, original but not exclusive jurisdiction to the bankruptcy judges, and the provision that a district court "may" share its exclusive bankruptcy jurisdiction with the bankruptcy judges by referring cases to them, vests the bankruptcy judges with whatever limited legal and equitable jurisdiction they need to determine the cases referred. Just as traditionally legal causes of action do not lose their identity in district court by virtue of the merger of law and equity, they do not lose their identity by being labeled "core" proceedings in 28 U.S.C. § 157 and being assigned to a jurisdictionally indivisible "unit" of the district court.

Even if the bankruptcy judges are considered a type of equitable or legislative tribunal, Congress could not extinguish the petitioners' Seventh Amendment rights by entrusting trials of historically legal rights and remedies to that tribunal. *Ross v. Bernhard*, 396 U.S. 531 (1970). *Katchen v. Landy*, 382 U.S. at 336, citing *Schoenthal*, applies this concept in a bankruptcy context by reaffirming a defendant's right to jury trial in a preference action, providing the defendant has not itself invoked the jurisdiction of the bankruptcy court by filing a claim, as is the case here.

Congress, in any event, never intended to abrogate the right to jury trial in traditionally legal causes of action. The 1898 and 1978 Bankruptcy Acts and interpretative case law clearly preserved the right of jury trial

in actions like the present one where a trustee seeks a money judgment in an action to recover a preference or fradulent transfer. Under the 1898 Act, such suits were called "plenary" and were tried to a jury on the law side of district court. In 28 U.S.C. § 1480 of the 1978 Act, Congress preserved the requirement of jury trials for "plenary"-type actions while assigning jurisdiction over them to the bankruptcy court. A majority of courts interpreting the 1978 Act allowed jury trials in actions like the present one either on the grounds that a "plenary" suit for a money judgment is essentially in action at law, or by following a traditional Seventh Amendment analysis.

The 1984 Act impliedly repealed the jury trial provisions of the 1978 Act but made its new and highly ambiguous jury trial provision, 28 U.S.C. § 1411, inapplicable to cases, like the present one, filed before July 10, 1984. Nevertheless, the legislative history of § 1411 is instructive as it reflects the continuing sense of Congress that the right to jury trial under traditional bankruptcy law should be preserved. The ambiguities in § 1411, which leave unclear whether Congress intended to restrict jury trials in bankruptcy to personal injury and wrongful death cases, can easily be resolved in favor of jury trials in all traditional "plenary"-type or legal causes of action when read against the legislative history of that provision.

ARGUMENT

POINT I

A BANKRUPTCY TRUSTEE'S SUIT TO RECOVER MONIES FRAUDULENTLY TRANSFERRED WAS HISTORICALLY AN ACTION AT LAW FOR WHICH THE RIGHT OF JURY TRIAL IS PRESERVED UNDER THE SEVENTH AMENDMENT.

The Seventh Amendment provides that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." Statutory causes of action must be tried to a jury if they are "analogous" to "Suits at common law." *Tull v. United States*, 107 S.Ct. 1831, 1835 (1987).

To determine whether a contemporary statutory cause of action is analogous to a suit at common law, the cause of action must first be compared "to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity" – an analysis the court below neglected completely to perform – and next the relief sought must be examined to "determine whether it is legal or equitable in nature." *Tull, id.* Of the two steps, "characterizing the relief sought is '[m]ore important' than finding a precisely analogous common law cause of action. . . . *Curtis v. Loether*, 415 U.S. at 196, 94 S.Ct. at 1009." *Tull*, 107 S.Ct. at 1837. *See also Pernell v. Southall Realty*, 416 U.S. 363, 375-376 (1974) (The Seventh Amendment requires trial by jury in all suits involving "rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty").

A. Suits to recover fraudulently transferred goods and monies were tried at law under 18th-century English bankruptcy practice.

The trustee sued Granfinanciera and Medex under the fraudulent transfer provisions of the 1984 Act, 11 U.S.C. § 548 (98 Stat. 378) and 11 U.S.C. § 550 (98 Stat. 379), to recover the monies transferred by General Coffee to Granfinanciera and Medex in 1982. Section 548(a)(1), pleaded in Count II of the trustee's complaint, allowed him to avoid any transfer occurring within one year prior to bankruptcy that the debtor made "with actual intent to hinder, delay, or defraud" his creditors. Section 548(a)(2), alleged in Count I, allowed the trustee to avoid any transfer made within the same one-year period while the debtor was insolvent, and from which the debtor received less than a reasonably equivalent value. Section 550 provides that to the extent a transfer is avoided under § 548, the trustee may recover the property transferred or its value.

The obvious purpose of §§ 548 and 550 is to allow the trustee to recover monies that are properly part of the debtor's estate and should be ratably distributed among creditors, but which the debtor intentionally or constructively attempted to put beyond his creditors' reach. Although preferences are made to benefit a creditor, 11 U.S.C. § 547(b)(1) (98 Stat. 378), while fraudulent transfers need not be, both types of transfers by a debtor ultimately hinder, delay or defraud the debtor's creditors and thus are violative of the basic policy of non-discriminatory distribution that underlies the bankruptcy law. *Cf. Van Iderstine v. National Discount Co.*, 227 U.S. 575, 582 (1913) ("Conveyances may be fraudulent because the

debtor intends to put the property and its proceeds beyond the reach of his creditors; or because he intends to hinder and delay them as a class; or by preferring one who is favored above the others.") Given the virtually identical harms worked by both types of transfers, the jursidictional principles that historically governed the fora in which preferences could be recovered should logically apply, in a Seventh Amendment analysis, to fraudulent conveyances as well. *See* 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 98 at 184 (rev. ed. 1940). ("[W]hat is true of a preference, which essentially is an offense against a bankruptcy law as such, is *a fortiori* true of a fraudulent conveyance. . . .").

English case law in the 18th-century characterized a preference as a type of fraudulent conveyance, and a fraud upon the bankruptcy law itself. *Alderson v. Temple*, 4 Burr. 2235, 98 Eng.Rep. 165, 167, 168 (1768) ("All acts to defraud creditors or the public laws of the land are void, and if the nature of the act be a conveyance or grant, 'tis not only void, but an act of bankruptcy"); *Harman v. Fishar*, 1 Cowp. 227, 98 Eng.Rep. 998, 1001 (1774) ("[N]o trader can do an act of fraud, contrary to the spirit of the bankrupt laws, and to the injury of his creditors. . . . [H]e cannot take his estate out of that management which the law puts it into"). *See, e.g., Smith v. Payne*, 6 T.R. 152, 101 Eng.Rep. 484 (1795); *Barnes v. Freeland*, 6 T.R. 80, 101 Eng.Rep. 447 (1794); *Thompson v. Freeman*, 1 T.R. 155, 99 Eng.Rep. 1026 (1786); *Rust v. Cooper*, 2 Cowp. 629, 98 Eng.Rep. 1277, 1279 (1777); *Martin v. Pewtress*, 4 Burr. 2477, 98 Eng.Rep. 299 (1769); *Compton v. Bedford*, 1 Black W. 362, 96 Eng.Rep. 202 (1762). *See also, The Case of Bankrupts*, 2 Co. Rep. 25a, 76 Eng.Rep. 441 (1584).

In each of the foregoing cases, the debtor's assignees[2] in bankruptcy sued at law in trover, with a jury, to recover preferentially transferred chattels and monies. Fraudulent preferences were also routinely recovered at law by the common law actions of assumpsit (for money had and received, or goods sold and delivered) and debt. *Smith v. Hudson*, 4 T.R. 212, 100 Eng.Rep. 979 (1791); *Vernon v. Hanson*, 2 T.R. 287, 100 Eng.Rep. 156 (1788); *Atkin v. Barwick*, 1 Strange 165, 93 Eng.Rep. 450, 451 (1774); *Hussey v. Fiddall*, 3 Salk. 59, 88 Eng.Rep. 1353 (1699).

There is no doubt that assumpsit, trover and debt were uniquely common law, not equitable causes of action. Assumpsit was the action by which contractual or quasi-contractual obligations could be enforced, or the wrongful use of monies or goods redressed by a money judgment. Assumpsit largely supplanted the former action of "debt," which was "[a]n action for a fixed sum of money due for any reason," and could be used "as a means of recovering liquidated sums." Trover was a delictual action somewhat akin to conversion. F. Maitland, The Forms of Action at Common Law 51-52; 55-58 (rep. 1971); 7. W. Holdsworth, A History of English Law, 440-441 (2d ed. 1937).

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[2] Under English bankruptcy practice at the time, creditors filed a petition in Chancery. The Chancellor approved the appointment of commissioners who would oversee the appointment of assignees, chosen by the creditors, in whom all rights to the bankrupt's property, including that held by third persons, would then be vested for the benefit of the creditors. 2 W. Blackstone, Commentaries * 479-486.

The bankruptcy trustees not only sued preferred creditors at law, but sued anyone at law who had obtained or used a share of the bankrupt's estate in fraud of creditors. In *Phillips v. Hunter*, 2 H. Bl. 402, 126 Eng.Rep. 618 (1795), and *Hunter v. Potts*, 4 T.R. 182, 100 Eng.Rep. 962 (1791), certain creditors, following the debtor's bankruptcy in England, attached his monies in North America. The bankrupts' assignees sued and recovered at law for money had and received. In *Thompson v. Councell*, 1 T.R. 157, 99 Eng.Rep. 1028 (1786), the debtor, in straightened circumstances following his bankruptcy, entrusted his sister-in-law with some of his personal effects with the request that she use those goods to maintain himself and his family. The sister-in-law, who was not a creditor of her brother-in-law, borrowed money on the goods which she duly applied to the support of the debtor and his family. Since the assignees were vested with title to the transferred property from the time of bankruptcy, a recovery in trover against the sister-in-law on a jury verdict for the value of the goods, was approved.

A jury verdict in a trover action, brought under circumstances analogous to those in an action by bankruptcy assignees, was also approved in *Cadogan v. Kennett*, 2 Cowp. 433, 98 Eng.Rep. 1171 (1776). There, the plaintiffs, trustees under the marriage settlement of Lord Montfort, sued Montfort's judgment creditor and levying sheriff's officers who had seized goods which, under the terms of the marriage settlement, had been conveyed to the trustees for the use of Montfort for life and then to the use of Montfort's wife and heirs. Montfort had transferred these goods to his trustees while he was indebted

to the defendant. Citing 13 Eliz. c. 5 (1571), the seminal statute against fradulent conveyances, which provided "that no act whatever done to defraud a creditor or creditors shall be of any effect against such creditor or creditors," *id.* at 1172, Lord Mansfield held that there was no evidence Montfort's marriage settlement was motivated in any way by a desire to defrraud his creditors and approved the jury's verdict for the trustees. In the opinion, however, Lord Mansfield reaffirmed the capacity of the common law to deal with fraudulent conveyances stating, "The principles and rules of the common law, as now universally known and understood, were so strong against fraud in every shape, that the common law would have allowed every end proposed by the statutes [of Elizabeth, against fraudulent conveyances]". *Id.* at 1172. *See also, Foley v. Burnell,* 2 Cowp. 436, 98 Eng.Rep. 1173 (1779).

Thompson v. Councell and *Cadogan v. Kennett* represent two sometimes parallel and sometimes convergent case lines in the development of the law of fraudulent conveyances in a non-preference context. *Thompson v. Councell,* as well as *Phillips v. Hunter* and *Hunter v. Potts,* reflect an already well-developed jurisdiction at law over bankruptcy assignees' suits to recover fraudulent conveyances not explicitly dependent upon 13 Eliz. c. 5, the fraudulent conveyance statute. *Cadogan v. Kennett,* on the other hand, reflects the well-accepted use at law to which 13 Eliz. c. 5 was being put – with Lord Mansfield's endorsement that the statute could not "receive too liberal a construction, or be too much extended in suppression of fraud," 98 Eng.Rep. at 1172 – in reaching fraudulent conveyances

arising in a non-bankruptcy context. Despite their independent origins in English law, and their initially independent development, these two lines of authority converged in the English Bankruptcy Act of 1603, 1. Jac. 1, c. 15, which incorporated 13 Eliz. c. 5 and made a fraudulent transfer, even to a non-creditor, an act of bankruptcy that could be recovered by the bankruptcy assignees. 1 GLENN, *supra,* at 96-99.

That equity would not entertain an action for the return of fradulently transferred monies or goods is evidenced not only by the volume and uniformity of the foregoing legal precedent but by decisions in Chancery. In *Ex parte Scudamore,* 3 Ves. Jun. 85, 30 Eng.Rep. 907, 909 (1796), the Chancellor stated to the bankruptcy commissioners that "You are applying on behalf of the assignees desiring me to direct the money to be paid over. I do not think I can make that order. . . .Let an action be brought against Haverfield if the parties shall think proper." In *Ex parte Gayner* (1755), described in *Worsley v. Demattos,* 1 Burr. 484, 98 Eng.Rep. 1160, 1165 (1758), the debtor had preferred all his creditors but one. The Chancellor denied an application by the excluded creditor to summarily order the preferred creditors to surrender the money and personalty they had received, "as they had a right to have it tried at law." Similarly, in *Hobb v. Hull,* 1 Cox. 446, 29 Eng.Rep. 1242 (1788), the court refused to set aside an allegedly fraudulent separation agreement at the request of the husband's creditors saying that if it fell within 13 Eliz., the plaintiffs had a remedy at law, but even if it did not their possible remedies were still "at law" and not in equity.

The abundance of fraudulent conveyance and preference cases tried at law, and the equity decisions expressly declining jurisdiction over such cases, reflect a well-established jurisdiction in 18th-century English courts of law over actions to recover fraudulent transfers of money and goods, in both bankruptcy and non-bankruptcy contexts.

B. The monetary relief demanded by the trustee in this proceeding is entirely legal in nature.

In *Schoenthal v. Irving Trust Co.*, 287 U.S. at 94, a trustee under the Bankruptcy Act of 1898 (30 Stat. 544) sued in equity for an accounting and to recover preferential payments. The defendants demanded but were denied a transfer to the law side of the court and a trial by jury. This Court, citing several of the English cases on which Granfinanciera and Medex now rely, observed that "[i]n England long prior to the enactment of our first Judiciary Act, common-law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts." The English jury practice in these instances was preserved by the Seventh Amendment as expressed through Section 267 of the Judicial Code (36 Stat. 1163), which provided that "[s]uits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law." Since the facts stated in the trustee's bill and the essentially monetary relief he demanded would have afforded him an adequate remedy at law, this Court held that the defendants were entitled to a transfer to the law side of the court and a jury trial. *Schoenthal*, for the reasons expressed in the comparative

discussion of preference and fraudulent transfer (Subpoint A., *supra*.), is as controlling in an action for the recovery of one form of conveyance as the other. GLENN, *supra*, at 184.

Schoenthal is also dispositive of the circuit court's position that the trustee's claim for monetary relief below was actually equitable in nature since it was inseparably connected to or flowed from his underlying equitable demand for avoidance. (Pet.Cert.App. 14-15). There is no essential difference between the trustee's avoidance power under § 60b of the 1898 Act (30 Stat. 562), addressed in *Schoenthal*, and under § 548 of the 1984 Act. In a proceeding under either section, avoidance is merely a nominal prerequisite to obtaining a judgment for the amount of a purely monetary transfer. This Court, in *Schoenthal*, properly refused to allow the trustee's demand for a decree declaring the transfers preferential, *i.e.*, avoided, to dominate its Seventh Amendment analysis. "[T]he constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-478 (1962).

Avoidance has properly been regarded as an irrelevant consideration in suits to recover monetary transfers. In *Warmath v. O'Daniel*, 159 F. 87 (6th Cir. 1908), cited approvingly in *Schoenthal*, 287 U.S. at 95 n. 3, the bankruptcy trustee, arguing against a jury trial in an action to recover the amount of a preference, had suggested that "the court must first set aside the transfer before it could proceed to judgment, and that it is the peculiar province of a court of equity to set aside unlawful transfers." *Id.* at

88. Calling this argument "an ingenuous, but unsubstantial figment" and a "devise for evading the statute forbidding a resort to a court of equity," *id.* at 88, 89, the court observed that "[n]o distinct or formal preliminary action was required or contemplated by the statute. . . .[N]or indeed is anything more required than in any ordinary action at law where the plaintiff is always bound to establish the facts which create the liability, whereupon, and without more, the court gives judgment for the sum he is entitled to recover." *Id.* at 89.

The identical argument was rejected in *Foster v. Zellman*, 24 F.2d 1002 (D.Mass. 1928), wherein the court stated that the trustee's right to recover "does not rest on any principle of equity applied exclusively in courts of chancery. It springs from legislative enactment. The Bankruptcy Act, and not the equity court, declares the transaction voidable by the trustee." Again, in *Grant v. National Bank of Auburn*, 197 F. 581, 590 (N.D.N.Y. 1912), another case approved in *Schoenthal*, 287 U.S. at 95 n. 3, the court answered the same argument by noting that "[t]he form of action is specifically authorized, and as stated, the transaction is voidable by and at the election of the trustee and not by the court. The mere demand and bringing of the action is an election to avoid the transaction." Under 11 U.S.C. § 548(a) of the 1984 Act, it is still the trustee who "may avoid" the transfer by prosecuting his action, and, under 11 U.S.C. § 550(a), recover a judgment "to the extent that [the] transfer is avoided under section . . . 548."

The courts, in short, have never considered 'avoidance' to be a remedy, either equitable or legal, in an action to recover a monetary transfer, but rather have

regarded it as a shorthand way of describing the statutory elements of an avoidable transfer that a trustee must prove in order to recover. The fiction of avoidance was tacitly recognized for what it was by the bankruptcy judge in this case, who neither in his memorandum opinion nor in his money judgment thought it necessary or relevant to decree 'avoidance' of the transfers to Granfinanciera and Medex. (Pet.Cert.App. 24-32). The trustee, of course, has never been heard to complain about this omission.

Even if 'avoidance' were to be considered an equitable remedy, and the primary relief sought by the trustee herein, the trustee's monetary claim nevertheless remains a legal one. The petitioners' right to a jury trial of this independent legal remedy cannot be lost by characterizing it as merely "incidental" to the remedy of avoidance. *Cf. Curtis v. Loether*, 415 U.S. 189, 197 n. 11 (1974); *Dairy Queen, Inc. v. Wood*, 369 U.S. at 470, 473.

Schoenthal is equally dispositive of the circuit court's assertion that a money judgment for the amount of a fraudulent transfer is actually an equitable remedy and not the type of money judgment requiring a jury trial under the Seventh Amendment. (Pet.Cert.App. 15). *Schoenthal* held that a complaint for the recovery of preferential transfers "of ascertained and definite amounts," which alleged no facts justifying equitable relief, sought a simple monetary remedy that was historically plain, adequate and complete at law. 287 U.S. at 95, 96. The money judgment sought and recovered by the trustee below is indistinguishable from the money judgment sought by the trustee in *Schoenthal* and sought by and awarded to bankruptcy assignees in 18th-century courts of law. Since the defendants in *Schoenthal* were entitled to a jury trial

on the issue of their monetary liability under the bankruptcy laws, Granfinanciera and Medex are too.

As *Schoenthal* clearly illustrates, this Court accords significant weight in a Seventh Amendment analysis to the fact that the relief the trustees seeks is purely monetary. *See also, Dairy Queen, Inc. v. Wood*, 369 U.S. at 476 ("Petitioner's contention . . . is that insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal. We agree with that contention"); *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891) ("[W]here an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law"). There is no apparent reason to depart from the *Schoenthal* analysis in this case.

POINT II

EVEN IF IT HAD INTENDED TO DO SO, WHICH IT DID NOT, CONGRESS' DESIGNATION OF THE TRUSTEE'S FRAUDULENT TRANSFER ACTION AS A BANKRUPTCY "CORE" PROCEEDING UNDER 28 U.S.C. SECTION 157(b)(2) OF THE 1984 ACT COULD NOT AND DID NOT ABROGATE GRANFINANCIERA'S AND MEDEX'S SEVENTH AMENDMENT RIGHT TO JURY TRIAL.

A. A bankruptcy court under the 1984 Act is not a specialized court of equity but a court of limited legal and equitable jurisdiction.

Although it has been loosely stated that bankruptcy courts are courts of equity, most courts shrink from characterizing bankruptcy jurisdiction as entirely and necessarily equitable. *See, e.g., Katchen v. Landy*, 382 U.S. at 327

(Bankruptcy courts are "essentially" courts of equity); *Pepper v. Litton*, 308 U.S. 295, 304 (1939) (A bankruptcy court is a court of equity "for many purposes"). It is far more accurate to say that the jurisdiction of a bankruptcy court is not inherently equitable but rather reflects the scope of its current statutory grant. In the absence of a specific congressional withdrawal of legal jurisdiction – which did not occur in the 1978 and 1984 Acts – to the extent a bankruptcy court is statutorily required to hear a traditionally legal matter, it necessarily must exercise that form of jurisdiction.

This approach was adopted in *Simpson v. Western Hardware and Metal Co.*, 227 F. 304 (W.D.Wash. 1915), where the court observed that since the 1898 Act, as amended, defined the bankruptcy court to include the district court, and extended the jurisdiction of bankruptcy courts, as thus defined, to plenary avoidance actions, bankruptcy courts "must exercise equitable or legal jurisdiction according to the nature of the actions. To determine which is the appropriate remedy, a consideration of the nature of relief sought is necessary in light of section 267 of the Judicial Code. . . ." 227 F. at 312. *Schoenthal*, too, allowed for suits to recover monetary preferences in the bankruptcy courts ("They may be brought in the state courts as well as in the bankruptcy courts"), but required that the remedy, in whatever court it was sought, still be pursued "by action at law." 287 U.S. at 95.

The 1984 Act, 28 U.S.C. § 1334(a), vests "original and exclusive" unified equitable and legal jurisdiction in the

district court over all "cases"[3] under title 11. Section 1334(b) provides that the district courts shall have "original but not exclusive jurisdiction of all civil proceedings arising under title 11," a category which includes transfer avoidance proceedings under 11 U.S.C. § 548. There is, however, no longer a separate judicial entity called a "bankruptcy court" under the 1984 Act. Section 151 of title 28 (98 Stat. 336) merely provides that the bankruptcy judges in each judicial district "shall constitute a unit of the district court to be known as the bankruptcy court." Under 28 U.S.C. § 157 (98 Stat. 340), "core proceedings", which in § 157(b)(2)(H) are defined to include "proceedings to determine, avoid, or recover fraudulent conveyances," may be referred to, heard and determined by "the bankruptcy judges" for the district. "Thus while functionally there may appear to be a separate bankruptcy court, for jurisdictional purposes there is only one court, i.e., the district court." *Firestone v. Dale Beggs & Assocs. (In re Northwest Cinema Corp.)*, 49 B.R. 479, 480 (Bankr. D. Minn. 1985); *Neill v. Borreson (In re John Peterson Motors, Inc.)*, 56 B.R. 588, 590 (Bankr. D. Minn. 1986) ("The proper focus on a motion to dismiss for lack of subject matter jurisdiction must be on the district court because this court is not jurisdictionally a separate court"); *Huffman v. Perkinson (In re Harbour)*, 840 F.2d 1165, 1183-1184 (4th

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[3] A "case" is a petition for relief under a chapter of the Bankruptcy Act. A "proceeding" is a subpart of a "case". *See* Norton & Lieb, *Jurisdiction and Procedure Under the 1984 Bankruptcy Amendments*, ANNUAL SURVEY OF BANKRUPTCY LAW 53, 55-61, 63-64, 86-88 (1985).

Cir. 1988) (Widener, J., dissenting) ("It is the *'district courts'* which have jurisdiction in bankruptcy cases under 28 U.S.C. § 1334, not bankruptcy courts").

Since the district court is invested with "original" legal jurisdiction over avoidance actions seeking a money judgment, and merely transfers its jurisdiction over such matters to the bankruptcy judges under § 157(a) and (b)(1), the bankruptcy judges must necessarily receive or share, with each referred case, as much of the district court's legal jurisdiction as is necessary to decide such traditionally legal actions. *Boss-Linco Lines, Inc. v. Laidlaw Transp., Ltd. (In re Boss-Linco Lines, Inc.)*, 55 B.R. 299, 305 (Bankr. W.D.N.Y. 1985). (As a result of the 1984 Act, "[t]he bankruptcy courts currently have authority to exercise not only much of the jurisdiction characterized as 'summary' under [the 1898] Act, but also preference and fraudulent conveyance jurisdiction which had been 'plenary' under that Act."). One component of the authority of bankruptcy judges to hear, determine, and enter judgments in legal actions, that they must either inherently possess or that is impliedly transferred with the transfer of the adjudicatory power itself, is the authority to employ a jury as a finder of fact.[4]

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[4] Whether a bankruptcy judge could have presided over a jury trial of the trustee's action is an issue that never arose in this case. Had the bankruptcy judge determined that Granfinanciera and Medex were entitled to a jury trial, but that under *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), he could not conduct it, the problem could easily have been resolved by a withdrawal of reference under 28 U.S.C. § 157(d) ("The district court may withdraw, in whole or

(Continued on following page)

B. Congress could not transform the trustee's historically legal cause of action into an equitable one or deprive petitioners of their Seventh Amendment rights by assigning the trial and determination of the action to a specialized court of equity.

The unification of summary and plenary or equitable and legal bankruptcy jurisdiction in the district court, and thus in the bankruptcy judges as inseparable components of that court under the 1984 Act, is analogous to the merger of law and equity jurisdiction in the district courts by the adoption of the Federal Rules of Civil Procedure in 1938. Since the merger of legal and equitable civil jurisdiction could not abrogate the Seventh Amendment's command that juries determine legal rights and remedies, *see Dairy Queen, Inc. v. Wood*, 369 U.S. at 471-472, the merger of legal and equitable bankruptcy jurisdiction may not be treated differently. Having created a district court/bankruptcy judge amalgam of shared legal jurisdiction, Congress cannot strip a traditional legal action assigned to that forum of its Seventh Amendment status. *See Pernell v. Southall Realty*, 416 U.S. at 383; *Curtis v. Loether*, 415 U.S. at 195.

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in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown"). *See, e.g., Eisenberg v. Guardian Group, Inc. (In re Adams, Browning & Bates, Ltd.)*, 70 B.R. 490, 498 (E.D.N.Y. 1987) where the bankruptcy judge, uncertain of her authority to conduct a jury trial in a preference and fraudulent transfer action, offered to return the matter to district court if the parties did not consent to a jury trial before her.

Even if bankruptcy judges are collectively regarded as a type of "specialized court of equity," *see Curtis v. Loether*, 415 U.S. at 195, the law is equally clear that legal rights and remedies do not lose their Seventh Amendment identity merely by being presented in an equitable forum. As this Court stated of a legal claim subsumed within an equitable derivation action, "The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action," and "legal claims are not magically converted into equitable issues by their presentation to a court of equity. . . ." *Ross v. Bernhard*, 396 U.S. at 538. Similarly, Congress cannot magically convert historically legal causes of action into equitable proceedings by labeling them "core" proceedings, and thus "nullify the Seventh Amendment". *Edelman v. Michigan Blueberry Growers Ass'n. (In re Silver Mill Frozen Foods, Inc.)*, 80 B.R. 848, 854 (Bankr. W.D. Mich. 1987). *See also*, cases collected in Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 Minn. L. Rev. 601, 652 n. 251 (1988).

Katchen v. Landy does not require a contrary result and, in fact, is supportive of the petitioners' position herein. There, petitioner filed claims in bankruptcy. The trustee objected and responded with a petition asserting that the claimant had received voidable preferences and demanding judgment for their amount.

In sustaining the referee's authority to adjudicate the trustee's preference action in a summary proceeding without a jury, this court relied exclusively on the various procedural consequences flowing from the petitioner's status as a claimant in bankruptcy. First, the power to

allow, disallow and reconsider claims against the bankrupt's estate was an administrative function of the bankruptcy court that traditionally was exercised in a summary fashion. *Katchen v. Landy*, 382 U.S. at 329-330. Secondly, § 57(g) of the 1898 Act (30 Stat. 560, as amended), expressly disallowed the claims of creditors who had received voidable preferences unless they first surrendered their preferences. The § 57(g) process for determining the existence of a voidable preference was made statutorily inseparable from the process of allowing or disallowing the preferred creditor's claim. *Id.* at 330. Thus, a determination of the trustee's objection to a claim under § 57(g) would necessarily supplant and render meaningless a separate and subsequent plenary action on the preference alone. *Id.* at 331-334. Thirdly, the petitioner could not object to the loss of the right to be sued in a plenary action because, by filing a proof of claim, and thereby invoking the aid of the bankruptcy court, he was bound by the procedural consequences of his choice. *Id.* at 332 n. 9, 334. In final response to the petitioner's argument that the procedure below abrogated his Seventh Amendment rights to a plenary jury trial of the preference action, this Court stated that it would "dismember" the congressional scheme, and be inconsistent with the expeditious purposes of the 1898 Act to hold the claims process in abeyance until the preference action was heard since it was the intent of Congress that claims, and § 57(g) objections to claims, be speedily and summarily resolved. 382 U.S. at 336-340.

Significantly, *Katchen v. Landy* excepted from its Seventh Amendment analysis a factual situation indistinguishable from the present case, in which a defendant

files no claim in bankruptcy and there is no § 57(g) objection to litigate:

> But although petitioner might[5] be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 53 S.Ct. 50, when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity.

382 U.S. at 336. It is the act of claiming against the debtor's estate in *Katchen*, and nothing less, that "converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*." *Id.* Courts allowing jury trials in core proceedings against non-claimaints have distinguished *Katchen* on precisely that basis. *See, e.g., Edelman v. Michigan Blueberry Growers Ass'n*, 80 B.R. at 852-854; *Daily v. First Peoples Bank of New Jersey*, 76 B.R. 963, 966 (D.N.J. 1987); *Zimmerman v. Cavanagh (In re Kenval Marketing Corp.)*, 65 B.R. 541, 550-551 (E.D. Pa. 1986); *Hassett v. Weissman (In re O.P.M. Leasing Services, Inc.)*, 48 B.R. 824, 827 n. 2 (S.D.N.Y. 1985). Courts which rely on *Katchen* to disallow jury trials in such cases, on the other hand, impermissibly ignore or minimize *Katchen*'s pivotal distinction between claimants and non-claimants. *See, e.g.,*

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[5] The term "might" is not an "equivocation" of *Schoenthal* as suggested in *DuVoisin v. Anderson (In re Southern Indus. Banking Corp.)*, 66 B.R. 370, 374 (Bankr. E.D. Tenn. 1986), but simply reflects the fact that even a non-claimant will not be entitled to a jury trial in a plenary action if the trustee demands only equitable relief. *Edelman v. Michigan Blueberry Growers Ass'n*, 80 B.R. at 852-853.

Nordberg v. Granfinanciera, (Pet.Cert.App. 16) ("If . . . Congress may convert a creditor's legal right into an equitable claim . . . Congress may likewise treat other core proceedings in bankruptcy such as actions to avoid fraudulent transfers. . . ."); *Huffman v. Perkinson*, 840 F.2d at 1176 ("[A]ctions that are, and always have been considered to be, legal for seventh amendment or other purposes, become equitable when merged into bankruptcy proceedings").

Equally unsupportive of the trustee's position are those cases which recognize that Congress may deny a Seventh Amendment right to a jury trial in statutory causes of action it assigns to a non-article III or legislative tribunal. Although bankruptcy judges under the 1984 Act are non-article III judges because they lack tenure and salary guarantees of that article, 28 U.S.C. §§ 152, 153 (98 Stat. 336, 338), *see Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. at 57-61, it is not clear that such judges are absolutely precluded from presiding over jury trials. Congress could not, in any event, transmute an historically legal common law cause of action into one outside the protection of the Seventh Amendment by assigning its determination to judges who are constitutionally incapable of presiding.

The causes of action that may be entrusted to non-article III tribunals without an attendant right of jury trial, however ill-defined in the current case law, certainly do not include those with well-established common law antecedents. In *Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977), for example, administrative penalties for unsafe workplaces were found to have "created a new cause of action, and remedies therefor, unknown to the common law." *Id.* at 461. Throughout the opinion this Court

stressed the need for the statutory cause of action to have been essentially unanticipated in the common law, impliedly limiting the jurisdiction of non-article III tribunals to "new statutory obligations," *id.* at 450; "new types of litigation," *id.* at 455; and "new public rights and remedies." *Id.* at 460. *See also, National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937), where this Court observed of administrative action ordering an employee reinstated and back wages paid that "the proceedings is one unknown to the common law. It is a statutory proceeding."

Crowell v. Benson, 285 U.S. 22 (1932) illustrates another aspect of the rule limiting the entrustment of common law rights to non-article III tribunals. There, a private right – a worker's right to sue for injuries received in maritime employment – was supplanted by an administrative remedy under the Longshoremen's & Harbor Workers' Compensation Act. While traditional admiralty jurisdiction over such claims was of ancient origin, administrative jurisdiction did not violate the Seventh Amendment because admiralty cases, like equity cases, were not considered suits at "common law." *Id.* at 52; *Waring v. Clark*, 46 U.S. (5 How.) 441, 460 (1847).

Nor are traditional common law rights and remedies converted into some non-legal form, outside the protection of the Seventh Amendment, by virtue of the public rights doctrine. Public rights are matters that historically "could be conclusively determined by the Executive and Legislative Branches," as distinguished from those matters that are inherently judicial, *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. at 68, *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 589 (1985), but which Congress chooses to entrust to a quasi-

judicial, or non-article III tribunal.[6] Public rights may also subsume private rights with which they become inextricably interwoven if a litigant voluntarily submits them for disposition to a non-article III forum. *See Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245, 3258-3260 (1986); *Katchen v. Landy*, 382 U.S. at 322 n. 9.

In contradistinction to each of the theories discussed above, the trustee's complaint against Granfinanciera and Medex alleges an action and remedy of ancient common law lineage that has always been litigated at law. Petitioners, of course, have filed no claims against the debtor's estate. The trustee's action, under these circumstances, maintains its common law and Seventh Amendment identity in any tribunal to which it is assigned. *See* Gibson, *supra*, at 655 n. 262.

C. Bankruptcy Acts since 1898 have permitted jury trials in trustees' avoidance suits seeking monetary remedies against non-claimants.

No statutory provisions on jury trials in bankruptcy are applicable to this proceeding.[7] Nevertheless, an

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[6] Notwithstanding dicta in *Northern Pipeline*, 458 U.S. at 71, that "the restructuring of debtor-creditor relations . . . may well be a 'public right'," it is difficult to conceive of a garden variety lawsuit by a private bankruptcy trustee seeking monies that will, in all likelihood, be distributed to private creditors, as involving a "public right."

[7] Although §1411 of the 1984 Act provides, albeit ambiguously, some right to jury trial (See Point II.C, *infra*.), §122b (98 Stat. 346) of the 1984 Act provided that "section 1411(a) of title

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understanding of the treatment accorded jury trials in actions to recover monetary fraudulent transfers under the 1898 and 1978 Acts, and of the legislative background of §1411 of the 1984 Act, will demonstrate that Congress unambiguously opted for jury trials of fraudulent transfer and other legal actions under the first two Acts, and failed to enact anything in 1984, even if it had the constitutional power to do so, abolishing that long-standing practice. This course of congressional action suggests that Congress neither intended to create a legislative bankruptcy court or a specialized court of equity under

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28, United State Code, as added by this Act, shall not apply with respect to cases under title 11 of the United States Code that are pending on the date of enactment of this Act or to proceedings arising in or related to such cases." Since the debtor's "case" herein, *i.e.*, its petition for reorganization filed May 18, 1983, was pending on July 10, 1984, the date the 1984 Act became law, §1411(a) is not applicable to the trustee's proceeding against Granfinanciera and Medex.

Section 1480, the jury trial provision in the 1978 Act, is likewise inapplicable. Notwithstanding the uncertainty surrounding the inconsistent repealing effects of §113 (98 Stat. 343) and §121 (98 Stat. 345) of the 1984 Act on § 402(b) (92 Stat. 2682), which, along with §405(b) (92 Stat. 2685), provided the initial effective date for § 1480, the July 10, 1984 enactment of §1411 and the unequivocal repeal of §405(b) by §114 (98 Stat. 343) undoubtedly effected the demise of §1480. Certainly, nothing in the legislative history of §1411 suggests that Congress intended §1480 to have continuing validity after July 10, 1984.

Therefore, absent any specific legislation in force providing jury trials for cases filed before July 10, 1984, but tried afterwards, the petitioners' right to jury trial in this proceeding must necessarily be predicated entirely on the Seventh Amendment as discussed in Point I, *supra*.

the 1984 Act in which all proceedings must be litigated without a jury, nor regarded fraudulent transfer proceedings as inherently equitable.

Pursuant to the 1898 Act, as amended, under which *Schoenthal* was decided, "[s]uits to recover preferences constitute[d] no part of the proceedings in bankruptcy but concern[ed] controversies arising out of it." 287 U.S. at 94-95. A trustee seeking to recover a monetary preference or fraudulent transfer in the adverse possession of a third party non-claimant had to commence a "plenary" suit at law in which the defendant had a right to jury trial. Only when the transferred monies were in the actual possession of the bankruptcy court, or the defendant's possessory claim was made in bad faith and without legal justification, or the parties consented to bankruptcy court jurisdiction, or the matter involved the ordinary administration of the debtor's estate, could the bankruptcy court (actually a bankruptcy referee sitting in district court) decide the dispute in a "summary" or non-jury fashion. *See* Bankruptcy Act of 1898, §§ 19(c), 23 (30 Stat. 551, 552); *Katchen v. Landy*, 382 U.S. at 327-328; *Harrison v. Chamberlin*, 271 U.S. 191, 193-195 (1926); *Boss-Linco Lines, Inc. v. Laidlaw Transp. Ltd.*, 55 B.R. at 303; Gibson, *supra*, at 605-606.

The Bankruptcy Act of 1978, effective October 1, 1979 (92 Stat. 2549), abolished the summary/plenary distinction and vested jurisdiction over proceedings falling under both former categories in a new, consolidated Bankruptcy Court. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 206 n. 13 (1983); *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. at 53-55; S.Rep. No. 989, 95th Cong., 2d. Sess. 18 (1978) *reprinted in* 1978 U.S.

Code Cong. & Admin. News 5787, 5803-5804. Section 1480(a) (92 Stat. 2671) of title 28 of the 1978 Act provided, however, that with the exception of a limitation on jury trials in involuntary bankruptcy proceedings, nothing in amended titles 11 or 28 affected "any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979 [the last effective day of the 1898 Act]".

Notwithstanding the statutory demise of the summary/plenary distinction by virtue of the consolidation of both forms of action in the new bankruptcy court, Congress intended that the distinction still be applied in determining a litigant's rights to jury trial. H.R. Rep. No. 595, 95th Cong., 1st Sess. 12, 448 (1977) *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 5973, 6404, states:

> Proposed section 1480 requires that the right of jury trial be preserved as it is under present law. Bankruptcy courts will be required to hold jury trials to adjudicate what are under present law called "plenary suits," that is, suits that are brought in State or Federal courts other than the bankruptcy courts.
>
> . . . .
>
> Subsection (a) [of §1480] continues any current right to litigants in bankruptcy cases, and cases related to bankruptcy cases, such as plenary actions, to a jury trail. . . .

See also, S. Rep. No. 989 at 157, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5943.

As a consequence of the language and legislative history of § 1480(a), a majority of courts applied some form of summary/plenary analysis when determining a

litigant's right to a jury trial in preference and fraudulent transfer proceedings filed under the 1978 Act. *See, e.g., Farmers & Merchants Nat'l Bank v. Aylesworth (In re Arnett Oil, Inc.)*, 44 B.R. 603 (N.D.Ind. 1984); *Beck v. Fairchild Aircraft Corp. (In re Sunair Int'l, Inc.)*, 32 B.R. 142 (Bankr. S.D. Fla. 1983); *Belfance v. Sizzler Family Steak Houses (In re Portage Assocs., Inc.)*, 16 B.R. 445 (Bankr. N.D. Ohio 1982). *See also*, cases collected in Gibson, *supra*, at 610 nn. 42 & 43, 611-612 n. 46. These courts, however, regarded the test for determining whether a preference or fraudulent transfer action was plenary or summary for jury trial purposes as far simpler than that required under the 1898 Act for resolving jurisdictional disputes. *See, e.g., McLouth Steel Corp. v. Marblehead Lime Co. (In re McLouth Steel Corp.)*, 55 B.R. 357, 361-362 (E.D.Mich. 1985) ("Using the summary/plenary framework to determine the right to jury trial does not interfere with Congress' intent to eliminate time consuming jurisdictional battles"); *Jahn v. Lamb (In re Lamb)*, 29 B.R. 950 (Bankr. E.D. Tenn. 1983) ("[U]sing the [summary/plenary] distinction on the jury trial question is not the same as using it to determine what court can try the case and should not result in the same kind of delay").

The simplified summary/plenary analysis applied by this group of courts devolved largely into a determination of whether the trustee was seeking entirely monetary relief against a third party non-claimant. If he was, his action was sufficiently analogous to a "plenary" action to require a jury trial. *See, e.g., Beck v. Fairchild Aircraft Corp.*, 32 B.R. at 145-146 ("[I]f the preference suit seeks only the recovery of money, it is a plenary proceeding. . . ."); *Farmers & Merchants Nat'l Bank v. Aylesworth*, 44 B.R. at

604 (The "Trustee requested a money judgment in his complaint and did not seek any equitable relief. Farmers did not file a claim with the Bankruptcy Court. Accordingly, the facts of this case, analyzed under the law as stated in *Schoenthal*," require a jury trial).

A second group of courts affirmed the pre-1978 right to jury trial where a trustee sought a monetary recovery against a non-claimant, but did so without resort to a summary/plenary analysis. These courts found Congress' abolition of the summary/plenary distinction for jurisdictional purposes to be inconsistent with its judicial preservation even for the limited purpose of determining a litigant's right to jury trial. However, since Congress, in enacting § 1480(a), plainly intended to preserve existing rights to jury trial, these courts interpreted § 1480(a) as necessarily permitting, if not requiring, a traditional Seventh Amendment analysis. *See, e.g., Young v. Peter J. Saker, Inc. (In re Paula Saker & Co, Inc.)*, 37 B.R. 802, 807 (Bankr. S.D.N.Y. 1984); *Martin Baker Well Drilling, Inc. v. Koulovatos (In re Martin Baker Well Drilling, Inc.)*, 36 B.R. 154, 155-156 (Bankr. D. Me. 1984). *See also*, cases cited in Gibson, *supra*, at 610-611 n. 44, 613 n. 53, 614.

The two analyses of § 1480, discussed above, did not lead to inconsistent results. *Young v. Peter J. Saker, Inc.*, 37 B.R. at 807 n. 5, (A "summary/plenary analysis ultimately reduces itself to a law/equity analysis"); *Zimmerman v. Cavanagh*, 65 B.R. at 554 n. 5 ("[I]t ultimately makes little difference which standard is applied, for the result will almost always be the same."). Whatever conceptual approach is used, Granfinanciera and Medex would clearly have been entitled to a trial by jury under the 1978 Act.

The 1984 Act impliedly repealed § 1480(a) and replaced it with 28 U.S.C. § 1411(a) (98 Stat. 335). Section 1411(a) states that "Except as provided in subsection (b) of this section [limiting jury trials in involuntary proceedings], this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." The legislative history of § 1411, or more accurately the complete lack thereof, strongly suggests that Congress, even if it possessed constitutional authority to do so, did not intend to abolish or limit the right to jury trial in historically legal core proceedings. *Cf. Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) ("It is clear, of course, that no Act of Congress can authorize a violation of the Constitution").

After *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. at 84-87, held that the broad grant of jurisdiction to the bankruptcy court under 28 U.S.C. § 1471 (92 Stat. 2668), of the 1978 Act violated Article III, Congress began the process of formulating a constitutional jurisdictional scheme. The process in the House of Representatives culminated on March 21, 1984, with the passage of H.R. 5174, incorporating amendments by Reps. Kastenmeier and Kindness. 130 Cong. Rec. H1853-54 (daily ed. March 21, 1984). The Kastenmeier/Kindness amendment replaced the Article III bankruptcy court proposed by Rep. Rodino, 130 Cong. Rec. H1807, 1826 (daily ed. March 21, 1984) (statements of Rep. Rodino and Rep. Matsui, co-sponsor of H.R. 5174) with a non-Article III tribunal. The Kastenmeier/Kindness amendments did not contain any provision for jury trials. H.R. 5174, 98th Cong., 2d Sess., 130 Cong. Rec. H1789-92

(daily ed. March 20, 1984). The floor debates on H.R. 5174 and its amendments contain no explanation for why jury trials were not mentioned in the House bill.[8]

In the Senate, by contrast, the membership unambiguously expressed its intention to preserve the right of jury trial in proceedings to which the right attached before the 1978 Act. Senators Thurmond and Heflin sponsored an amendment to H.R. 5174, numbered as § 1411(a),

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[8] Representatives Kastenmeier and Kindness stated that their amendment was "essentially a legislative enactment" of the emergency bankruptcy rules proposed by the Judicial conference and adopted after *Northern Pipeline Co.* 130 Cong. Rec. H1847, 1849 (daily ed. March 21, 1984). Paragraph (d)(1)(D) of the rules (*reprinted in* 1 COLLIER ON BANKRUPTCY ¶3.01 at 3-16 (15th ed. 1979)), prohibited bankruptcy judges from conducting jury trials but added that "[t]hose matters which may not be performed by a bankruptcy judge shall be transferred to a district judge". Obviously, a fraudulent transfer action demanding monetary remedies did not lose its legal status under ¶ (d)(1)(D), but could simply have been transferred to the district court for trial. More importantly, since the emergency rules incorporated the concept of "core" jurisdiction, and at the same time allowed jury matters to be referred to and heard by a district court judge, the 1984 Act reflects Congress' belief that jury trials are compatible with "core" proceedings. Congress later manifested its approval of jury trials even in bankruptcy court when, in 1983, this court approved (461 U.S. 975, 1078, 1084), and Congress failed to modify under 28 U.S.C. § 2075 (78 Stat. 1001), rules of procedure for conducting jury trials in bankruptcy. *See* Rules 9015, 9027 (repealed, August 1, 1987); *see also, Wolff v. Wells Fargo Bank (In re Moralez)*, 618 F.2d. 76, 78 n. 1 (9th Cir. 1980) (Failure of Congress to change the proposed bankruptcy rules indicates that the rules were consistent with congressional policy).

reading: "Except as provided in subsection (b) of this section this chapter and title 11 do not affect any right to trial by jury." Subsection (b) read as it does now. 130 Cong. Rec. S6108 (daily ed. May 21, 1984). In explaining his amendment, Sen. Thurmond stated:

> We have also added a provision regarding jury trials. This provision was included in S. 1013 but was not made a part of the House bill. It simply states that nothing in chapter 87 of title 28 or in title 11 affects any right to trial by jury. It does not affect in any way current law determining when a party is entitled to a jury trial.

130 Cong. Rec. S6082, 6084 (daily ed. May 21, 1984). Sen. DeConcini offered another amendment that essentially tracked the language of § 1480 (a) of the 1978 Act. 130 Cong. Rec. S6099, 6127-28 (daily ed. May 21, 1984). Sen. Tower offered an amendment to § 1411 (a) of the Thurmond/Heflin substitute that would have replaced the phrase "right to trial by jury" with "right guaranteed under the United States Constitution to trial by jury." 130 Cong. Rec. S6280 (daily ed. May 22, 1984).

On June 19, 1984, Senators Thurmond and Heflin again clarified the intent and purpose of their amendment:

> Mr. HEFLIN. Mr. President, there has been some question about the status of jury trials in the bankruptcy law. . . .
>
> . . . The purpose of [the amendment] is to eliminate any possible ambiguity as to Congress' original intent in connection with the preservation of rights to jury trials. When Congress passed [§ 1480] as part of the Bankruptcy Reform Act of 1978, it intended to maintain the status quo on jury trial rights as such

> rights had existed prior to the expansion of the Bankruptcy Court's jurisdiction. However, as drafted, the provision engendered confusion as to how to determine when a litigant was entitled to a jury trial. Moreover, courts differed on what was meant by the phrase "any statute in effect on September 30, 1979." It was not clear whether "statute" encompassed the U.S. Constitution as well as the various State constitutions.
>
> This changing [sic] language is intended to clarify Congress' original intention that the expansion of powers granted to the bankruptcy system under the Bankruptcy Reform Act of 1978 was not intended to alter rights to jury trials which might have existed under State or Federal law prior to 1978. Congress never intended that the filing of a bankruptcy petition by a debtor act as an escape hatch from jury trials.
>
> Thus, where a debtor, creditor or noncreditor third party would have had a right to a jury trial on an issue of fact pursuant to Federal or State law absent application of the bankruptcy laws, this amendment ensures that such rights remain intact. This is true whether or not an entity requesting a jury trial has filed a proof of claim with the bankruptcy court.
>
> Mr. President, I would like to make an inquiry of the distinguished floor manager concerning two sections of the bill. The first concerns § 102 as it amends § 1411 of title 28 of the United States Code.
>
> Would you agree that the intent of the amendment you are making is only to simplify the language of existing law and there is no intention to effect any substantive change?
>
> Mr. THURMOND: Yes, the Senator is correct.

130 Cong. Rec. S7618-19 (daily ed. June 19, 1984). The Thurmond/Heflin amendment passed the Senate on June

19, 1984. 130 Cong. Rec. S7619, 7625 (daily ed. June 19, 1984). House and Senate conferees then met and, among other changes, produced the present text of § 1411(a) that was approved by both houses on June 29, 1984.

The legislative history on what occurred in conference is virtually nonexistent. No House or Senate Report was prepared and the House Conference Report, which consisted solely of the text of H.R. 5174, did not contain a joint explanatory statement. Statements of floor leaders on June 29, 1984, provide the only insight into the conference process but fail to explain what was intended by the language of § 1411(a).

Senator Thurmond observed that "[n]ew language on the issue of jury trials is included. Section 1411 will now provide that this chapter of title 28 and title 11 do not affect a right to trial by jury under applicable non-bankruptcy law with regard to a personal injury or wrongful death tort claim." 130 Cong. Rec. S8888 (daily ed. June 29, 1984). No other Senator or Senate conferee addressed the treatment of jury trials in H.R. 5174.

In the House, Rep. Kastenmeier, after speaking of the procedures incorporated into the bill for personal injury and wrongful death cases, stated that "in this narrow range of cases the parties do not lose any right to a jury trial that they may have had if the claim had been cognizable outside the bankruptcy context." 130 Cong. Rec. H7492 (daily ed. June 29, 1984). Of the fourteen House managers or conferees, thirteen spoke, but only three even mentioned the jury trial provision they had just passed. Of the three, only Rep. Kastenmeier's short and ambiguous statement could conceivably be understood as

endorsing a restrictive effect for § 1411. 130 Cong. Rec. H7489-97 (daily ed. June 29, 1984).

In the absence of evidence of the conferees' intent, the sense of both houses of Congress on the jury trial issue, as inferred from the general course of debate, becomes of heightened importance. *Cf. Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440, 463 n. 8 (1937) (When legislation is obscure one may look "to the debates in general in order to show common agreement on purpose as distinguished from interpretation of particular phraseology"); *Federal Trade Comm'n v. Raladam Co.*, 283 U.S. 643, 650 (1931) ("[T]he fact that throughout the consideration of this legislation there was common agreement in the debate as to the great purpose of the act, may properly be considered in determining what that purpose was and what were the evils sought to be remedied").

Furthermore, even the absence of debate in Congress over the obviously important issue of jury trials is highly significant. Radical changes in the existing legal order should not be deemed effected by Congress "without the consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate as to the desirability, of so fundamental a change. . . ." *Ozawa v. United States*, 260 U.S. 178, 194 (1922). *See also, United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 108 S.Ct. 626, 634 (1988) ("[I]t is most improbable that [a "major change in the existing rules"] would have been made without even any mention in the legislative history."); *cf. United States v. James*, 106 S.Ct. 3116, 3123 (1986) (Congressional debate of the issue

shows that the statutory language "was no drafting inadvertence" and that "Congress understood what it was saying"); *United States v. Pfitsch*, 256 U.S. 547, 551, 552 (1921) (Senate's express relinguishment of its version after a conference with the House showed that the final language "was the result not of inadvertence, but of deliberate action in the face of opposition"; "It is plain, then, that Congress had this question presented to its attention in a most precise form.").

Clearly, if Congress had intended to effect a major change in the bankruptcy law by eliminating jury trials in fraudulent transfer actions, it would have done so in specific, unambiguous language:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-267 (1979). The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." Swarts v. Hammer, 194 U.S. 441, 444 (1904). . . .

Midlantic Nat'l Bank v. New Jersey Dept. of Envtl Protection, 474 U.S. 494, 501 (1986). *See also, Thompson v. Thompson*, 218 U.S. 611, 618 (1910) (Far reaching changes "should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention."); *Wolfe v. First Fed. Savings & Loan Ass'n of Paragould (In re Wolfe)*, 68 B.R. 80, 88 (Bankr. N.D. Tex. 1986) (A proceeding as significant as a jury trial would have been "explicitly prohibited" if that was Congress' aim. The court refused to indulge the presumption that § 1411 was simply an "inartfully drafted prohibition against jury trials. . . .").

Section 1411(a) is plainly ambiguous. It does not prohibit the jury trial of any issue in any court but simply says that nothing in titles 11 or 28 affects any right to trial by jury in claims for personal injury or wrongful death. This is entirely consistent with a construction that for all other legal causes of action the right of jury trial remains as it was under bankruptcy or common law. Moreover, by stating in § 1411(b) that a district court "may order the issues arising [in voluntary proceedings] under section 303 of title 11 to be tried without a jury", Congress implies that § 303 issues may sometimes be tried with a jury. Since nothing in § 303 or in the 1984 Act grants a right to jury trial in involuntary proceedings, the right to a § 303 jury trial must originate either in § 1411(a) or the Seventh Amendment. Section 1411 therefore appears to create new jury rights, not eliminate any. More fundamentally, if § 1411(a) had been intended to eliminate all jury actions in bankruptcy § 1411(b), eliminating jury trials in involuntary proceedings, would be completely unnecessary. *See* Gibson, *supra*, at 624-25; COWANS, 1 BANKRUPTCY LAW & PRACTICE, § 1.6 at 61 (1987 ed.).

The circumstantial evidence suggests that the language of § 1411 was inadvertent and that the conferees were simply interested in insuring that tort claimants, particularly asbestosis victims, did not lose their rights to jury trial in bankruptcy. *See* 130 Cong. Rec. H1850, 1851

(daily ed. March 21, 1984) (statements of Reps. Kastenmeier and Frank); 130 Cong. Rec. S6098-99 (daily ed. May 21, 1984) (statements and amendment to H.R. 5174 by Sen. DeConcini); 130 Cong. Rec. S7621, 7622 (daily ed. June 19, 1984) (statements by Sen. DeConcini); admission of Sen. DeConcini, a Senate conferee, in the presence of Sen. Dole, another conferee, that the conferees did not intend to alter or modify the right to jury trial under the 1978 Act, 3 ABJ NEWSLETTER 1, 3, (Winter 1984-1985), *quoted in* Gibson, *supra*, at 629 n. 128. Given the large number of inconsistencies and errors identified in other parts of the 1984 Act – which one commentator describes as establishing "a record for inept performance by Congress" – the failure of Congress to draft an unambiguous jury trial provision becomes less inscrutable. *See* Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conferenee, and the Legislative Process*, ANNUAL SURV. OF BANKR., L. 1, 30-31 (1985).

In light of the intractable ambiguity of § 1411, the absence of any congressional debate or explanation, and considering that the ambiguity concerns the presence or absence of constitutional and judicially developed rights to jury trial in traditionally legal causes of action, it is virtually impossible to conclude that Congress silently intended to eliminate in § 1411 all rights to jury trial in all core bankruptcy proceedings. There simply is no remotely persuasive evidence in the legislative history of § 1411 to suggest that Congress intended to effect such a radical, and, petitioners submit, unconstitutional, change in the law.

CONCLUSION

A bankruptcy trustee's action to recover a monetary transfer has a long history in England and in this country as a legal cause of action triable to a jury. Congress has confirmed both the legal nature of the trustee's cause of action and the right to jury trial of that action in the bankruptcy acts of 1898 as amended, and 1978, and has not, in the 1984 Act, shown that it has changed its mind. Under principles of bankruptcy jurisdiction that recognize the right to jury trial in legal or plenary-type proceedings under the Seventh Amendment and considering that "[t]he federal policy favoring jury trials is of historic and continuing strength," *Simler v. Conner*, 372 U.S. 221, 222 (1963), Granfinanciera and Medex are entitled to a jury trial in this proceeding. Accordingly, petitioners request that the decision of the circuit court be reversed and the proceedings remanded to the bankruptcy court for retrial before a jury.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 1334

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

REPLY

BRIEF

Supreme Court, U.S.
FILED
DEC 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1716

In The

Supreme Court of the United States

October Term, 1988

GRANFINANCIERA, S.A., a Colombian corporation, and MEDEX, LTDA., a Latin American corporation,

Petitioners,

vs.

PAUL C. NORDBERG, Creditor Trustee for the Estate of Chase & Sanborn Corporation, f/k/a General Coffee Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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STATEMENT OF THE CASE

A. Respondent's "Overview of Bankruptcy Jurisdiction"[1]

Respondent's conclusion from his historical overview —that Congress has always "treat[ed] jury trials in bankruptcy proceedings as a matter of legislative grant" (RB 6-7)—is misleading in its superficiality. Every United States bankruptcy act, until 1978, distinguished the bankruptcy court's summary functions from the district court's or the state courts' jurisdiction to hear preference and fraudulent transfer actions as plenary courts of law or equity.[2] Thus, while Congress necessarily had to provide jury trials by special statute for those proceedings within the bankruptcy court's summary jurisdiction, Congress understandably felt that it did not need to reconfirm the Seventh Amendment's obvious applicability to common

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[1]Petitioners adopt respondent's numerical and alphabetical subsections so that their replies can more easily be related to respondent's arguments.

[2]Bankruptcy Act of 1800: 2 Stat. 19, §§ 52, 58 (Jury trials permitted on creditors' claims and acts of bankruptcy); §§ 10, 13 and 17 (Assignees must recover transfers and preferences by separate suits in law or equity). Bankruptcy Act of 1841: 5 Stat. 440, §§ 1, 4 (Jury trials permitted on dischargeability and acts of bankruptcy); §§ 6 and 8 (Bankruptcy court's summary jurisdiction did not extend to the assignee's suits at law or equity to recover preferences and transfers). Bankruptcy Act of 1867: 14 Stat. 517, § 41 (jury trial permitted for insolvency and acts of bankruptcy); §§ 2, 14, and 35 (Assignees must sue separately in law or equity). Bankruptcy Act of 1898: 30 Stat. 544, § 19 (Jury trials for insolvency and acts of bankruptcy); §§ 23, 60, 67(e) and 70(e) (Trustees must sue outside bankruptcy to recover preferences and transfers). Under 32 Stat. 797 (1903), § 13, the trustee could sue in federal or state court to recover preferences and transfers. Pub. L. No. 91-467, 84 Stat. 992 (1970) is hardly an exception to the foregoing bipartite systems as the respondent suggests. (RB 4 n. 9; 11). That statute merely preserved debtors' and creditors' existing rights to jury trials under state law when legal issues, ancillary to a finding of non-dischargeability, but formerly tried in state courts with juries, now had to be tried under the bankruptcy court's summary jurisdiction.

law actions by assignees and trustees outside that statutorily limited bankruptcy jurisdiction.[3]

II. KATCHEN v. LANDY IS NOT CONTROLLING

Katchen v. Landy, 382 U.S. 323 (1966), as the respondent concedes (RB 16), cannot be read in isolation from the bankruptcy statute in effect in 1966, which vested bankruptcy courts with only a summary, or 'equitable', jurisdiction. *Katchen*, accordingly, did not hold that all courts exercising a bankruptcy jurisdiction are specialized courts of equity, but simply, and far more narrowly, held that under the 1898 Act, as amended, courts exercising a summary jurisdiction over bankruptcy *claims* are exercising equitable powers. The respondent, quoting from *Barton v. Barbour*, 104 U.S. 126, 134 (1881), on which *Katchen*, 382 U.S. at 337, relies, omits the critical last line of the quotation which makes this clear: "Thus, a *claim* of debt or damages *against* the bankrupt is investigated by chancery methods." *Id.* [emphasis supplied]. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 454 n. 11 (1977) similarly interprets *Katchen* to mean that a bankruptcy court is a specialized court of equity only when it is exercising its summary claims jurisdiction. The obvious corollary to this principle in *Katchen* is that when a bankruptcy court, and certainly a district court under the 1984 Act, are not exercising traditionally summary or equitable powers, they are not sitting as specialized courts of equity.

[3]The common elements in these bankruptcy statutes suggest two important principles. First, the bankruptcy courts' summary jurisdiction was never viewed as so intractably administrative, or so completely summary, that jury trials would be procedurally disruptive or conceptually inappropriate under all circumstances. Secondly, § 1411 of the 1984 Act continues this historical tradition by, in subsection (b), reconfirming the availability of jury trials in some summary proceedings, and, in subsection (a), by leaving the right to jury trial in trustees' plenary actions to its traditional Seventh Amendment development and protection.

The respondent's insistence that *Katchen's* carefully circumscribed equitable holding controls this lawsuit also reflects his failure to understand that the significance of this holding has receded in the face of the 1984 merger of law and equity in the 1984 Bankruptcy Act. The bankruptcy court in *Katchen* may be viewed as the equivalent of a pre-merger court of equity in the district court system. The bankruptcy court could have declined jurisdiction over the trustee's cause of action against *Katchen* since the trustee sought a monetary remedy that was complete and adequate at law. However, since Katchen was also a claimant in bankruptcy, the court possessed a form of equitable clean-up jurisdiction that allowed it to decide the claim, and necessarily in the process, the trustee's legal contentions against Katchen which were factually inseparable from the claim.[4] *Katchen* found no justifica-

[4]Respondent erroneously maintains that petitioners' analysis of *Katchen* is dependent on a finding that Katchen consented to bankruptcy jurisdiction by filing a claim. (RB 15-21). Petitioners, however, rely only on the fact and no more, as does *Katchen* itself, that Katchen's *claim* in bankruptcy necessarily triggered the non-jury procedures followed and approved in that case. *Katchen*, 382 U.S. at 332 n. 9. Respondent confuses his own disagreement with the quasi-consent theory in footnote 9, with petitioners' interpretation of *Katchen* which simply takes the Court's justification for its holding as it finds it. Thus, the respondent's hypothetical creditor (RB 19-20), who files no claim but instead satisfies his rapaciousness by accepting preferences, is assured a jury trial in the trustee's plenary suit under the reasoning in *Katchen*, not under any argument unique to the petitioners. It is *Katchen*, in short, not the petitioners, which draws the claimant/nonclaimant distinction.

The respondent's remaining horribles are simply illusory (RB 20-21). Any demand that is the subject of a formal bankruptcy claim will never have to be tried to a jury because bankruptcy claims jurisdiction, even in England before 1791, has always been regarded as administrative and equitable. Because

(Continued on following page)

tion for bifurcating and delaying the proceedings by sending the trustee off to commence a separate legal action. This reasoning, however, clearly has no application to a proceeding in a merged court of law and equity, like the present one, in which no claim at all has been filed.

Katchen's concern with the delay, expense and disruption that initiating a plenary suit at law would entail, 382 U.S. at 339, is no longer a real concern after 28 U.S.C. §§ 1334(a) and (b) (1984), which vest jurisdiction over claims and over trustees' suits to recover preferences and transfers in the district court. A jury trial of a trustee's preference or fraudulent transfer action is now simply a routine procedural step in a unified lawsuit. A legal remedy—the separate plenary action—that was procedurally obstructive and thus, in *Katchen's* view, legally inadequate, must now be reassessed, as *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 507 (1959), requires, "not by precedents decided under discarded procedures, but in the light of the remedies now made available" under the 1984 Act. As the Court observed in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 n. 19 (1962), "procedural changes which remove the inadequacy of a remedy at law may sharply diminish the scope of traditional equitable remedies by making them unnecessary in many cases." *See Beacon Theatres*, 359 U.S. at 509. These observations on the contraction of equitable jurisdiction worked by a merger of law and equity were reconfirmed in *Ross v. Bernhard*, 396 U.S. 531, 539-40 (1970) (The merger of law and equity

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the 1984 Act contains a surrender requirement analogous to § 57g in the 1898 Act, 28 U.S.C. § 502(d), *Katchen* would still bar jury trials in cases where the creditor's claim and the trustee's preference counterclaim are factually or legally inseparable. *See* 28 U.S.C. § 157(b)(2)(C), which may be read as codifying the claim/counterclaim procedure approved in *Katchen*.

destroys "[p]urely procedural impediments" to the right to jury trial), and *Curtis v. Loether*, 415 U.S. 189, 196 (1974) (Jury trials must be allowed in ordinary civil actions where there is no longer a "functional justification" for denying them). *See* Warner, *Katchen Up in Bankruptcy: The New Jury Trial Right*, 63 Am. Bankr. L.J. 1 (1989) (Expected January issue); Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 Minn. L. R. 967, 997-1027 (1988). It is thus necessary to limit *Katchen* to its facts and to the discarded legal regime under which it was decided, and reject the respondent's urgings to give that decision a type of mortmain control over the unrelated facts and unified bankruptcy system involved in this case.

III. UNDER 28 U.S.C. § 1334 (1984) THE DISTRICT COURT, IMBUED WITH FULL LEGAL AND EQUITABLE JURISDICTION, IS GIVEN ORIGINAL JURISDICTION OVER ALL BANKRUPTCY MATTERS AND MAY TRY TRADITIONALLY LEGAL BANKRUPTCY PROCEEDINGS WITH A JURY.

Respondent again erroneously assumes, in the face of the clear language of § 1334, that all bankruptcy proceedings are now being heard in an equitable bankruptcy court. There is, however, no longer a "Bankruptcy Court"; there is only a district court of original and general jurisdiction that may refer a case or proceeding to the bankruptcy judges, hear a bankruptcy proceeding in its entirety, or withdraw any such proceeding, after reference, from a bankruptcy judge. 28 U.S.C. § 157(d) (1984). When this composite tribunal entertains a traditionally legal cause of action, the parties are entitled to a Seventh Amendment jury trial. If an entirely legal cause of

action—such as the trustee's fraudulent transfer action in the present case—is thus *capable* of being heard by an Article III judge under the 1984 Act, then there is plainly nothing in the 1984 Act inconsistent with a jury trial or the demands of Article III in this case.[5]

A. The Fraudulent Transfer Action Below Was One "At Law," Before the District Court, Which Customarily Uses a Jury for Fact-Finding in Legal Matters.

The respondent seems to be saying in this subpoint that Congress can assign the adjudication of traditionally legal rights to specialized judicial tribunals and thus destroy a litigant's Seventh Amendment jury right. (RB 23-25). This reasoning would allow Congress to codify every common law tort and contractual cause of action and then assign its statutory creations to judicial tribunals that adjudicate without the aid of a jury. Respondent offers this astonishing contention unaccompanied by any proposed limitations on Congress' ability to thus circumvent the Seventh Amendment, and without any authorities supporting this limitless view of congressional power. *See Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73-74 (1982).

Atlas Roofing, a decision on which respondent relies, stressed that the administrative causes of action and remedies in that case were ones "unknown to the common law," 430 U.S. at 461. Far from federalizing traditional common law causes of action, Congress created new administrative ones, in the equitable tradition, when it found the legal remedies "inadequate" and incomplete. *Id.* at 445, 460, 461. In *Block v. Hirsh*, 256 U.S. 135 (1921) the Court reluctantly validated, as a temporary war measure, an emergency rent control ordinance that it might not have upheld as a "permanent change." *Id.* at 157. *Block*, furthermore, was not a case in which the landlord's common law cause of action in ejectment was federalized but then, as in the case of the trustee's causes of action against the petitioners, simply reassigned to a legal tribunal. In *Block*, the cause of action was temporarily but completely suspended in favor of entirely administrative proceedings. *Crowell v. Benson*, 285 U.S. 22 (1932), like *Atlas Roofing* and *Block*, is easily distinguished as involving an entirely new administrative scheme created when common law remedies proved unworkable. *Crowell*, furthermore, involved the constitutionality of a non-judicial remedy formulated under Congress' admiralty and maritime jurisdiction where the right of jury trial was never guaranteed by the Seventh Amendment.

B. The Bankruptcy Judges, if a Specialized Non-Article III Tribunal, May Nevertheless Conduct Jury Trials.

There is no longer a separate or special[6] tribunal called the "Bankruptcy Court" under 28 U.S.C. §§ 151 and 1334. There is only one court—an Article III district court vested with full general jurisdiction.[7] Bankruptcy

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[5]Respondent's contention that juries are unnecessary in proceedings before non-Article III judges (RB 21-23) is quaintly utopian. Judicial corruption and arbitrariness of the type juries are meant to curb is as likely in bankruptcy judges with 14-year terms as in judges appointed for life. Logic in fact suggests that judges periodically dependent on the beneficence of others for higher salaries, benefits and reappointment, would be more political, and less independent, than their life-tenured brethren. See Gibson, *supra*, at 1042 n. 348.

[6]There is no historical evidence for the respondent's thesis that the adjudication of actions to recover preferences and fraudulent transfers requires a 'specialized' tribunal. The English practice of trying such actions before common law judges, and the American statutory tradition of allowing such actions to be heard by district court judges, and even state court judges, see, *supra*, note 2, at 1, shows quite clearly that Congress never regarded an avoidance action as a proceeding requiring a specialized judiciary or a specially trained finder of fact.

[7]The respondent, recognizing this, appropriately filed his complaint with the district court, not the bankruptcy court. (PCA 36).

judges, as officers of the Article III district court, are not Article III judges. However, this distinction does not deprive bankruptcy judges of their jurisdiction to preside over jury trials.

In *Pernell v. Southall Realty*, 416 U.S. 363 (1974), nontenured Article I judges of the Superior Court of the District of Columbia were permitted, in apparent conformity with the Seventh Amendment, to preside over jury trials. Federal magistrates, with the consent of the parties, may likewise conduct jury trials although they are non-Article III officers. 28 U.S.C. § 636(c)(1) (1979). While there are distinctions between the territorial jurisdiction and authority of bankruptcy judges on one hand and District of Columbia judges, and magistrates, on the other, *Northern Pipeline*, 458 U.S. at 71, these distinctions are not inconsistent, in principle, with the power of a bankruptcy judge, as an Article III adjunct, to conduct a jury trial. Cumulatively, 28 U.S.C. § 1334, which vests complete jurisdiction in the district court; the non-mandatory reference and discretionary withdrawal and regulatory procedures of 28 U.S.C. § 151, which grant the district court complete and continuing control over bankruptcy cases, proceedings and over the bankruptcy judges themselves; the bipartite appellate review process in 28 U.S.C. § 158; and the power of the circuit courts to appoint and remove bankruptcy judges under 28 U.S.C. § 152, for incompetence, misconduct and neglect of duty, leave sufficient essential attributes of judicial power and control over the bankruptcy judges in Article III courts. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985); *Northern Pipeline*, 458 U.S. 80-81 & n. 31.

The respondent's Article III arguments are also curiously selective and inconsistent. Respondent apparently has no objection to a bankruptcy judge exercising *every* power of an Article III judge *except* that of presiding over jury trials—assuming only Article III judges can preside over such trials. He did not object below to the reference of this case to the bankruptcy judge on Article III grounds, or to any exercise of Article III power by the bankruptcy judge as the trial progressed.[8]

C. The Use of Juries in Reorganization Proceedings and Bankruptcy Proceedings Generally Will Not Produce Delay or Frustrate Congressional Objectives.

Respondent's extended exercise in pyramiding assumptions and speculations, and parading horribles (RB 28-36), has a certain scholastic fascination, but no foundation in reality. One need look no further than the respondent's complaint to appreciate the speciousness of his eight-page rhetorical construct when applied to his own case. The reorganization plan in this case was confirmed in August, 1984. Under the plan, the debtor's "physical plants, trademarks and ongoing business" were sold and causes of action for preferences and transfers were vested in the respondent. Thus, the present action, filed *after* plan approval, and *after* liquidation of the debtor was approved and underway, could not conceivably have delayed either of those processes. (PCA 37). The history of this case conclusively proves that there is no necessary inconsistency between corporate reorganization procedures and jury trials of fraudulent transfer actions.

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[8] Gibson, *supra*, at 1040-43, notes the inconsistency in any system, such as the one respondent acquiesced in below, that would allow non-tenured bankruptcy judges, however politically motivated, to find facts and enter final judgments, but that would deny litigants the protection and buffering effect of a jury in that process.

Respondent also overlooks the fact that jury trials, both within bankruptcy's traditional summary jurisdiction, *e.g.*, to determine insolvency, whether acts of bankruptcy have been committed, and whether the debtor is entitled to a discharge, *see supra*, note 2, at 1, and outside that jurisdiction, in the form of plenary actions by assignees and trustees to recover preferences and transfers, were long a part of bankruptcy practice.[9] Jury trial procedures that were used in England before 1791 and continuously thereafter in the United States where they have been confirmed in one form or another by Congress and the courts, hardly can be characterized as inconsistent with the American conception of bankruptcy practice. *Pernell*, 416 U.S. at 383-84, recognizes that the compatibility of jury trials with a statutory scheme may thus be tested by historical experience. *Pernell* also recognizes that if the Seventh Amendment requires a jury trial, concerns about delay are of secondary, if any, importance, stating, "[W]e reject the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial," and "some delay, of course, is inherent in any fair-minded system of justice." 416 U.S. at 384, 385.[10]

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[9]Even outside the disputed issues in this case, and the uncertain scope of 28 U.S.C. § 1411, jury trials are permissible under the 1984 Act. A jury trial, presumably, would not be forbidden in a legal avoidance action where both parties consent to jury trial, or in a legal non-core proceeding where both parties consent to the bankruptcy judge entering final judgment. 28 U.S.C. § 157(c)(2).

[10]Underlying the respondent's argument at RB 28-36 is the unproven factual assumption that jury trials delay resolution of the proceeding. While it may possibly take longer to present the same evidence to a jury than to a judge, that is far too simplistic a criterion for assessing the impact of a jury on the length of a case. One must consider the cases that are

(Continued on following page)

IV.A. TRADITIONALLY, COURTS OF EQUITY HAVE NOT HAD CONCURRENT JURISDICTION OVER ACTIONS TO RECOVER FRAUDULENTLY TRANSFERRED MONIES.

Respondent clearly misunderstands both English chancery decisions he discusses at RB 37-38. In *Ex Parte Scudamore*, 3 Ves.Jun. 85, 30 Eng.Rep. 907 (1796), Williams was holding in trust Shepherd's share of their dissolved partnership's assets. Shepherd's assignees in bankruptcy petitioned chancery for an order directing Williams to turn over to them for the benefit of Shepherd's creditors Shepherd's existing share as well as his future share of the partnership's receivables. The chancellor found that the monies Williams was holding actually belonged to Shepherd's creditor Haverfield, because Shepherd, before bankruptcy, had effectively assigned these monies to Haverfield, and refused to issue a turnover order. He instead directed the assignees, if they wished, to sue Haverfield at law to recover the preference. Respondent, in assuming that a decree against Williams would have been indis-

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settled because of the parties' anticipation of how a jury would decide them, or because the trial judge mediated off-the-record settlement discussions which he could not do if he were trying the case. J. Guinther, *The Jury in America*, xv, 158 (1988). One must also factor in the post-trial efforts of the judge in reviewing the trial transcript and his or her notes, the parties' proposed findings of fact and law and post-trial briefs, and then researching and writing a decision. Palmer, *On Trial: The Jury Trial*, 20 F.R.D. 65, 78 (1957). One recent study concludes that, based on federal statistics, "[t]he availability of the jury does not lengthen the time a case stays in the court system," and that the jury is "a lesser factor than the evidentiary and legal nature of the case in determining the length of trial." Guinther, *supra*, at 168. Given such doubts over the existence and impact of jury delay, respondent should draw on more than vague feelings, intuitions, and legal folklore to support his assertion that jury trials obstruct the bankruptcy system. Certainly, petitioners' Seventh Amendment rights should not be foreclosed on such speculative factual assertions.

tinguishable from a judgment at law, misses several critical points about this case. First, the relief requested by the assignees was essentially equitable and injunctive—that Williams surrender a specific trust fund to them, and continue to pay to them Shepherd's share of the partnership's receivables as Williams collected them. Williams was sued, in essence, as a trustee and not as the recipient of a preference. Secondly, equity, not law, has always exercised summary jurisdiction over assets in the debtor's actual or constructive possession—here Shepherd's share of his partnership's assets. Most importantly, after denying equitable relief to the assignees, the chancellor did not direct the assignees to sue Haverfield for the monetary preference in equity, but at law.

In *Hobbs v. Hull,* 1 Cox 446, 29 Eng.Rep. 1242 (1788), the assignees in bankruptcy sued to set aside an alleged fraudulent conveyance of real estate in trust—a classical equitable remedy. The chancellor determined that the conveyance was not fraudulent because it was supported by at least an intangible consideration—the wife's alleged relinquishment of a cause of action for divorce—but nevertheless felt that the assignees might possibly have an action at law for ejectment or other legal relief. The point, again, is that the assignees sought only an equitable remedy from the chancellor who, in the belief that he had no jurisdiction to award legal relief, allowed the assignee to sue at law.[11]

[11]*Damsky v. Zavatt,* 289 F.2d 46 (2d Cir. 1961), and *Pettigrew v. Graham (In re Graham),* 747 F.2d 1383 (11th Cir. 1984), on which the respondent relies (RB 39 n. 28), were not actions for monetary relief but equitable actions to set aside conveyances of real estate. *Pettigrew,* 747 F.2d at 1387, in fact acknowledges, citing *Hobbs v. Hull,* that fraudulent conveyance actions seeking "legal remedies" were not tried in English equity courts.

B. The Restitution of Fraudulently Transferred Monies is a Traditionally Legal Remedy.

Respondent's argument at RB 39-43 is premised on the entirely erroneous assumption that if a monetary remedy is restitutionary, it must be equitable. In fact, the legal cause of action for money had and received, one of several causes of action derived from the common law action of assumpsit, was traditionally tried at law to a jury in pre-1791 England. *Moses v. Macferlan,* 2 Burr. 1005, 97 Eng.Rep. 676 (1760). The cause of action for money had and received is a restitutionary legal remedy that simply draws upon equitable principles. *Moses,* 2 Burr. at 1012, 97 Eng.Rep. at 680-81; *Buzard v. Houston,* 119 U.S. 347, 352 (1886) ("In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages,[12] when the like amount can be recovered at law in an action sounding in tort or for money had and received."); *Gaines v. Miller,* 111 U.S. 395, 397-98 (1884) ("Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. [citations omitted] The remedy at law is adequate and complete."). The rule that a cause of action seeking an entirely restitutionary monetary remedy is an action at law, not equity, is simply an application of the larger principle that equity cannot act

[12]The distinction, if any, between "damages" and other legal monetary relief is an irrelevant one in the context of this case. Because a trustee is absolutely entitled to the return of monies shown to have been transferred in derogation of 11 U.S.C. § 548, and a judge has no equitable discretion to refuse to enter a monetary decree for the amount of the transfer, an award under § 548 is virtually indistinguishable from an award of damages. *Cf. Albemarle Paper Co. v. Moody,* 422 U.S. 405, 442-43 (1975), (Rehnquist, J. concurring).

where the legal remedy is full, adequate and complete. *Dairy Queen*, 369 U.S. at 478; *Beacon Theatres*, 359 U.S. at 506-07; *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94 (1932); *Scott v. Neely*, 140 U.S. 106, 110 (1891).[13]

Respondent's attempts to distinguish *Schoenthal* as simply a product of the 1898 Act are unavailing. *Schoenthal*, independently of the 1898 Act, determined that where a district court action to avoid a monetary preference seeks a monetary remedy that is full, adequate and complete at law, the Seventh Amendment requires that the action be tried to a jury. 287 U.S. at 94-95. The present action is in district court because, with the demise of a separate "Bankruptcy Court" in 1984, complete jurisdiction over both bankruptcy "cases" and bankruptcy "proceedings" is now vested in the district court. Respondent has it backwards when he suggests (RB 43-44) that *Schoenthal*

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[13]Respondent's reliance on *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) (RB 40) and *Mitchell v. De Mario Jewelry*, 361 U.S. 288 (1960) (RB 42 n. 35) is misplaced. *Porter* and *Mitchell* are injunctive actions in which the plaintiff also sought an ancillary monetary remedy under the equitable clean-up doctrine. *Porter*, for example, was careful to note that without the request for injunctive relief, equity would not have afforded a purely monetary remedy. *Id.* at 399. These cases are irrelevant to the present case where the *only* relief requested was monetary.

Respondent's related argument (RB 39-41), that he simply sought the return of a specific fungible *res*, fares no better. The 1982 transfers, by wire to Granfinanciera and by cashiers' checks to Medex, had long since lost their separate identities by the time of the respondent's 1985 avoidance action and, precisely because money is fungible, could not be specifically recovered in equity. *See Buzard*, 119 U.S. at 353; *Litchfield v. Ballou*, 114 U.S. 190, 193 (1885). Even if the cashiers' checks to Medex still lay uncashed in Medex' possession, respondent's legal remedies of replevin or conversion would have been full, adequate and complete. *See Adams v. Champion*, 294 U.S. 231, 234 (1935); *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891). ("[W]here an action is simply for the recovery and possession of specific real or personal property . . . the action is one at law").

is inapplicable because the effect of the 1984 merger was to reduce the district court to a specialized court of equity. Rather, district court jurisdiction which had always been general and plenary, *i.e.*, legal or equitable depending on the nature of the trustee's action, was *expanded* by the 1984 Act to include jurisdiction over summary or administrative proceedings in bankruptcy, as well.[14]

V. THE RESPONDENT IS NOT ENTITLED TO ASK THIS COURT FOR A FACTUAL DETERMINATION THAT GRANFINANCIERA IS A FOREIGN INSTRUMENTALITY WHEN HE ACTED DILATORILY AND INEQUITABLY BELOW, HIS ARGUMENT IS LACKING ON THE MERITS, AND HE FAILED TO CROSS-PETITION FOR CERTIORARI.

The respondent filed his complaint in district court on May 17, 1985. On July 12, 1985, the district court referred the complaint to the bankruptcy judges for the district. (JA 1). For some reason or reasons, which must include the respondent's failure to diligently prosecute his case, the referral order was not transmitted to, or brought to the attention of, the bankruptcy judges until January 22, 1986. On November 25, 1985, however, the respondent had caused a summons to be issued by the clerk of the district court and, on December 26, 1985, served the summons on Granfinanciera in Bogota, Colombia. (App. 1-3).

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[14]Respondent erroneously suggests that *Schoenthal* does not really distinguish legal from equitable avoidance actions using a Seventh Amendment analysis. Any case that, like *Schoenthal*, discusses whether a legal remedy is plain, adequate, and complete is, preeminently, a Seventh Amendment case, because the distinction between legal and equitable remedies is only relevant when jury trial rights are at stake. *Schoenthal*, 287 U.S. at 94 (The distinction "serves to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed"); *Thompson v. Railroad Companies*, 73 U.S. (6 Wall.) 134, 137 (1867) ("The Constitution of the United States and the acts of Congress, recognize and establish the distinction between law and equity.").

Despite the directive of Fed.R.Civ.P. 4(a), incorporated by reference in Bankr.R. 7004(a), that the plaintiff "shall be responsible for prompt service" of the summons and complaint, the respondent delayed serving Granfinanciera for seven months. Respondent now argues, however, that the Foreign Sovereign Immunities Act ("FSIA")[15] applies because Granfinanciera only served its request for a jury trial after January 10, 1986, the date of its nationalization by the Colombian Government. (RB 47 & n. 40). Respondent chooses to ignore the fact that had he promptly effected service on Granfinanciera, all other time periods remaining the same, the jury demand would have been filed and denied, the trial would have been over, and the judgment would have been entered, well before Granfinanciera's nationalization.[16] The respondent should not be permitted to inequitably benefit from his own procedural delays.

The respondent's insistence that Granfinanciera's right to jury trial must be tested by its status at the time of its answer, rather than at the time the complaint was filed and served, or earlier, flies in the face of his successful insistence to the contrary at trial, and in petitioner's appeals to the district court and the circuit court. The respondent convinced the bankruptcy judge (App. 4), the district court (PCA 22), and the circuit court (PCA 11-12), that the FSIA did not apply because the fraudulent transfer, the suit to recover the transfer, and service of process, had occurred before Granfinanciera was nationalized. It is procedurally unseemly for the respondent now blandly

[15]28 U.S.C. § 1601 *et seq.*, 90 Stat. 2892 (1976).

[16]For example, using the chronology of events at JA 1, if the respondent had caused a summons to be issued on May 30, 1985, and served June 30, 1985, the trial would have been completed, and judgment entered by October 19, 1985.

to assume a legal and factual stance diametrically opposed to his consistent position in three lower courts.

The respondent's tactical about-face is not only inequitable and inconsistent, but legally ill-conceived. In determining a defendant's Seventh Amendment right to a jury trial, a court must look to the cause of action asserted and the relief demanded in the plaintiff's complaint. *Ross*, 396 U.S. at 538, 542; *Dairy Queen*, 369 U.S. at 476-77. If the allusion to non-jury trials in 28 U.S.C. § 1330(a) is considered jurisdictional,[17] then the jurisdictional status of Granfinanciera must be determined either at the time the complaint is filed, *cf. Anderson v. Watt*, 138 U.S. 694, 702-03 (1891) (Diversity for jurisdictional purposes is determined "by the condition of the parties at the commencement of the suit"), or at the time the cause of action accrued. As stated in *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988):

> It would appear that the determination of whether a party is subject to the court's jurisdiction under 28 U.S.C. § 1330 should be based upon a party's status at the time the act complained of occurred.

[17]Section 1330(a) provides that the district court shall have original jurisdiction over "any nonjury civil action" against a foreign state as defined in the FSIA. If, as *Houston v. Murmansk Shipping Co.*, 667 F.2d 1151 (4th Cir. 1982) suggests, the quoted phrase is not jurisdictional, then Granfinanciera could waive the provision, presumably enacted for its benefit, by demanding a jury trial in the federal forum into which it was involuntarily haled. That Congress did not view jury trials as absolutely incompatible with the FSIA is evidenced by the fact that a foreign state, sued in state court, may presumably demand a jury trial under state procedure. *Compare*, 28 U.S.C. § 1441(d). In any event, where, as here, the alleged commercial activity of the foreign state consists solely of a private corporation's acts four years prior to its nationalization, the need for uniformity of decision in a cause of action where the foreign government is so uninvolved should be subordinated to a litigant's Seventh Amendment rights. *Cf. Pex v. CIA Pervana de Vapores, S.A.*, 660 F.2d 61, 69, 75-76 (3d Cir. 1981) (Sloviter, J., dissenting).

> . . . As to completed acts upon which the complaint is based, the parties are bound by the jurisdictional facts existing at the time of those acts.[18]

The most procedurally disturbing aspect of the respondent's FSIA argument is that, without cross-petitioning for certiorari, respondent is now attempting to enlarge his rights under the circuit court's opinion and lessen those of the petitioner.[19] The circuit court held that the

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[18]*See Morgan Guaranty Trust Co. of N.Y. v. Republic of Palau*, 639 F.Supp. 706, 712-16 (S.D.N.Y. 1986) (Unless the defendant was a de facto governmental instrumentality prior thereto, its status under the FSIA is determined on the date the complaint is filed); *Braka v. Bancomer, S.A.*, 589 F.Supp. 1465, 1468 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (7th Cir. 1985) ("Bancomer was a state instrumentality as defined by the FSIA at the time of the lawsuit as well as at the time the act on which this suit is based took place"). *Cf. Barragan v. Banco BCH*, 188 Cal. App.3d 323, 232 Cal. Rptr. 758, 765 (4th Dist. 1987) (Defendant bank's nationalization, after action commenced, did not retroactively immunize it).

Riedel v. Bancam, S.A., 792 F.2d 587 (6th Cir. 1986), *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), and *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985), on which respondent relies (RB 47 n. 40), are distinguishable because in *Riedel*, the plaintiff's cause of action did not accrue until after nationalization, and in all three cases, the Mexican government's sudden monetary controls, and intervention in the parties' contractual relationship, of which nationalization was simply the last step, was the sole cause of each bank's breach of its repayment agreement with its customers. In Granfinanciera's case, by contrast, the Colombian government was not directly or indirectly involved in the 1982 acts alleged in the respondent's complaint. The presumption of immunity in 28 U.S.C. § 1604 coupled with the language of the commercial activity exceptions in § 1605 (a)(2) clearly require Colombia at least to have participated in Granfinanciera's 1982 dealings with the debtor before the *FSIA* is triggered.

[19]Without a cross-petition respondent may not question the lower court's decree "with a view either to enlarge his own rights thereunder or of lessening the rights of his adversary." *Morley Const. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191-92 (1937); *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924). Furthermore, to the extent the FSIA

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"FSIA is inapplicable to the case at bar." (CPA 12). The respondent, discontent with that finding, now seeks a ruling from this Court that the FSIA *is* applicable to Granfinanciera, and that Granfinanciera is not a private corporation but is, in fact, an instrumentality of the Government of Colombia. Such a finding would unquestionably enlarge the respondent's rights under the circuit court's decision and concomitantly decrease those of the petitioner. If this Court dismisses certiorari as to Granfinanciera or affirms on that basis, when the respondent renews his attempts to collect his judgment against Granfinanciera, a judicial finding that Granfinanciera is an instrumentality of Colombia may open up new areas of discovery in aid of execution, and execution, that are presently foreclosed to the respondent. The assets of Colombia's central banking institutions, *see Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F.Supp. 289 (S.D.N.Y. 1987), and possibly those of other Colombian governmental instrumentalities, *see First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 629-30 (1983) might, for the first time, become fair game in the respondent's collection efforts. The possibility that this may occur is enough to reject respondent's FSIA argument on procedural grounds.

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holdings below rest on the factual finding that Granfinanciera was not an instrumentality of Colombia at the time of the transfers, or on the implied finding that the nationalized Granfinanciera assumed all the obligations of its private predecessor, those factual issues may not be revisited here under the "two-court rule." *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n. 2 (1975).

CONCLUSION

For the foregoing reasons, the judgment below must be reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	)
CHASE & SANBORN CORP. f/k/a GENERAL COFFEE CORP.,	) CASE NO. 83-00889-BKC-TCB) CHAPTER 11
Debtor.	)
PAUL C. NORDBERG, as Creditor Trustee for the Estate of the Debtor, CHASE & SANBORN CORP. f/k/a GENERAL COFFEE CORP.,	)
Plaintiff,	) ADV. NO. 86-0043-BKC-TCB-A
vs.	)
GRANFINANCIERA, S.A., a Colombian corporation; and MEDEX, LTDA, a Latin American corporation,	)
Defendants.	)

ORDER ON DEFENDANTS' MOTION TO QUASH SERVICE OF PROCESS AND MOTION TO DISMISS

This complaint filed by a liquidating trustee appointed by a bankruptcy plan of reorganization seeks avoidance of several transfers aggregating $1.7 million made by the

bankruptcy debtor to these two Colombian corporations upon the ground that they were fraudulent under 11 U.S.C. § 548(a)(1) or (2), the Bankruptcy Code.

The complaint was filed in the District Court on May 17, 1985. On July 12, 1985, the District Judge referred the case to the Bankruptcy Court under 28 U.S.C. § 157(a) in accordance with the District Court's Order of Reference dated July 11, 1984. (C. P. No. 1). However, the Order of the District Judge was not transmitted to nor brought to the attention of the Bankruptcy Court until January 22, 1986 (six months later).

On January 25, 1986, the Bankruptcy Court scheduled the matter to be tried on February 20 and directed the defendants to answer within 15 days.

On February 11, the two defendants made a special appearance to move for quashal of service of process and to dismiss the complaint. (C. P. No. 21). Those motions were heard by the Bankruptcy Court on February 14 upon an expedited basis at movants' special request.

On February 14, several hours after the conclusion of the hearing, the parties were advised that each motion had been denied and that a written order would be provided as rapidly as the court's circumstances would permit. This Order confirms the oral ruling of February 14.

The plaintiff claims to have effected service upon each defendant by delivering a copy of the District Court complaint and a copy of a Summons issued by the Clerk of the District Court on November 25, 1985. (C. P. No. 3). This Summons was issued after the District Judge referred this matter to the Bankruptcy Court (C.P. No. 1). That Order also provided:

> "all proceedings in this case are stayed until further order of the Bankruptcy Court."

It is argued that the Summons of the District Court was a nullity and, therefore, its service was ineffectual.

I disagree. The intent and purpose of the District Judge's Order was to transfer the District Court case to this court for trial and determination. The District Judge did not intend that a new action be commenced in this court or that new process be issued from this court. Had he so intended, the District Court action would have been dismissed. It was appropriate that the District Court complaint be served with a District Court Summons issued by the Clerk of that Court.

The stay of further proceedings was intended to prevent the parties seeking further judicial action from the District Judge and to direct the parties for that purpose to the Bankruptcy Court.

There is no material difference in the process employed by the two courts nor is there any prejudice caused to the defendants by the use of the District Court summons.

Plaintiff's return of service upon each of the defendants was executed by a Colombian attorney and was acknowledged by a Vice-Consul of the United States. The return recites that service was made on December 26 upon a designated individual who was described as:

> "Officer at the mail office of"

each of the defendant corporations.

The service is governed by Rule 4(i)(1)(C), *Fed. R. Civ. P.*, which requires for service upon a corporation:

"delivery to an officer, a managing or general agent." The defendants have submitted an affidavit executed by the individual who received service of process in each instance. That affidavit recites the legal conclusion that the individual is:

> "not a managing or general agent, or an agent authorized by appointment or by law to receive service of process."

I find that the presumption which cloaks a return of service has not been overcome by the affidavit submitted by the defendants. *Hicklin v. Edwards*, 226 F.2d 410, 414 (8th Cir. 1955); *C. Wright & A. Miller, Federal Practice and Procedure: Civil*, § 1130 n. 78 (1969). In this instance, the attempted service was effective in the sense that it came almost immediately to the attention of each defendant as is demonstrated by the fact that each defendant almost immediately arranged to be represented by well-qualified counsel who have appeared before this court. The essential purpose, therefore, of the service of process has been accomplished.

Defendant has also argued that the service was ineffective because the defendants were "nationalized by the Government of Colombia" and, therefore, service was subject to the provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* It is conceded, however, that neither defendant was nationalized by Colombia until long after this action was commenced and after this service was effected. It is, I think, settled beyond serious question that the Act would have no applicability here for that reason.

The defendants, finally, have argued that they are not subject to an action in this United States District Court and that they must be sued, if at all, in Colombia. I disagree. The allegedly fraudulent transfers were made from the debtor's New York Bank in U.S. currency to the bank accounts of each defendant in a Miami bank. The entire transaction, therefore, occurred in this country and it was completed within this District. If either defendant resided within the District, there would be no question as to the appropriate situs of the litigation under 11 U.S.C. § 548. The fact that each defendant, though then maintaining a bank account in Miami employed for the purpose of receiving these transfers, was then and is now domiciled in Colombia does not divest this court of jurisdiction.

The grounds asserted in the defendant's motion to dismiss present no issue which has not been previously decided by this court in published opinions and for the reasons stated on the record at the hearing and no useful purpose would be served by repeating that discussion here.

Each motion on behalf of each defendant is denied.

DONE and ORDERED in Miami, Florida this 21st day of February, 1986.

/s/ Thomas C. Britton
Thomas C. Britton
Bankruptcy Judge